

No. 97-1802

Supreme Court, U.S.
FILED
NOV 18 1998

CLERK

In The
Supreme Court of the United States

October Term, 1998

DAVID CONN and CAROL NAJERA,

Petitioners,

vs.

PAUL L. GABBERT,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX
VOLUME II, PAGES 232 to 482

KEVIN C. BRAZILE*
Los Angeles County
Counsel's Office
648 Kenneth Hahn Hall
of Administration
500 West Temple Street
Los Angeles, California
90012
(213) 974-1943

Attorney for Petitioners

[*Counsel of Record]

MICHAEL J. LIGHTFOOT*
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT,
VANDEVELDE, SADOWSKY,
MEDVENE & LEVINE
655 South Hope Street
Los Angeles, California
90017
(213) 622-4750

Attorney for Respondent

Petition For Certiorari Filed May 4, 1998
Certiorari Granted October 5, 1998

COCKLE LAW BRIEF PRINTING CO., (800) 225-6000
OR CALL COLLECT (402) 342-2831

RECEIVED
NOV 19 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

Page

Volume I

Relevant Docket Entries.....	1
6/23/94 Complaint for Violation of Civil Rights; Demand for Jury Trial.....	6
8/5/94 Defendants Conn and Najera's Notice of Motion and Motion to Dismiss; Memorandum of Points and Authorities.....	82
8/26/94 Plaintiff's Opposition to Defendants Conn and Najera's Motion to Dismiss; Mem- orandum of Points and Authorities	99
7/8/94 Order To Reassign Case.....	145
8/31/94 Defendants Conn and Najera's Reply Memorandum of Points and Authorities in Sup- port of Their Motion to Dismiss	147
9/30/94 Order re Defendants' Motion to Dismiss ...	158
10/17/94 Defendants Conn and Najera's Answer to Complaint; Demand for Jury Trial.....	182
8/31/95 Defendants Conn and Najera's Notice of Motion and Motion for Summary Judgment; Memorandum of Points and Authorities; Sepa- rate Statement of Uncontroverted Material Facts and Conclusions of Law; Declarations and Exhibits in Support of Their Motion for Sum- mary Judgment.....	191
8/31/95 Defendants Conn and Najera's Sepa- rate Statement of Uncontroverted Material Facts and Conclusions of Law	218

TABLE OF CONTENTS – Continued

Page

Volume II

8/31/95 Defendants Conn and Najera's Declarations and Exhibits in Support of Their Motion for Summary Judgment..... 232

Exhibit 1 – 9/30/94 Order Regarding Defendants Conn and Najera's Motion to Dismiss.... 245

Exhibit 2 – Reporter's Transcript of 3/21/94 Grand Jury Proceedings..... 269

Exhibit 3 – 4/4/95 Deposition of Paul L. Gabbert ... 331

Exhibit 4 – 3/21/94 Witness List..... 362

Exhibit 5 – 5/4/95 Deposition of Traci L. Baker ... 363

9/18/95 Plaintiff's Consolidated Opposition to Defendants' Motions for Summary Judgment..... 385

9/18/95 Declarations in Support of Plaintiff's Consolidated Opposition to Defendants' Motions for Summary Judgment..... 415

9/18/95 Exhibits in Support of Plaintiff's Consolidated Opposition to Defendants' Motions for Summary Judgment 422

Exhibit 1 – 4/4/95 Deposition of Paul L. Gabbert 423

Exhibit 2 – 5/4/95 Deposition of Traci L. Baker ... 451

Volume III

Exhibit 3 – 8/4/95 Deposition of David P. Conn ... 483

Exhibit 4 – 8/3/95 Deposition of Carol Najera ... 521

TABLE OF CONTENTS – Continued

Page

Exhibit 5 – 8/1/95 Deposition of Leslie Zoeller 548

Exhibit 6 – 6/30/95 Deposition of Elliott Oppenheim..... 569

Exhibit 7 – 8/10/95 Deposition of Pattijo Fairbanks 575

Exhibit 8 – 9/30/94 Order Regarding Defendants Conn and Najera's Motion to Dismiss.... 583

Exhibit 9 – Reporter's Partial Transcript of 3/21/94 Grand Jury Proceeding..... 607

Exhibit 10 – Reporter's Transcript of 5/19/95 Proceedings 648

9/22/95 Defendants Conn and Najera's Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment; Declaration of David Conn 681

10/3/95 Judgment and Order Granting Defendants Conn and Najera's Motion to Dismiss 695

10/5/98 Order Allowing Certiorari..... 696

DE WITT W. CLINTON, County Counsel
 S. ROBERT AMBROSE, Assistant County Counsel
 DENNIS M. GONZALES, Principal Deputy
 County Counsel
 KEVIN C. BRAZILE, Principal Deputy County Counsel
 State Bar No. 113355
 648 Kenneth Hahn Hall of Administration
 500 West Temple Street
 Los Angeles, California 90012-2713
 (213) 974-1943
 Attorneys for Defendant
 CONN and NAJERA

UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	) CASE NO.
Plaintiff,	) CV 94-4227 ABC (Ex)
)
vs.	) DEFENDANTS CONN AND
DAVID CONN, CAROL	) NAJERA'S DECLARATIONS
NAJERA, ELLIOT	) AND EXHIBITS IN SUPPORT
OPPENHEIM, LESLIE	) OF THEIR MOTION FOR
ZOELLER and DOES 1	) SUMMARY JUDGMENT
through X.)
Defendants.	) DATE: SEPTEMBER 25, 1995
	) TIME: 9:00 A.M.
	) COURTROOM:
)
_____	) (Filed Aug. 31, 1995)

TO PLAINTIFF AND YOUR ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN that Defendants Conn
 and Najera hereby submit the attached declarations and

Exhibits 1-5, in support of their Motion for Summary Judgment.

DATED: August 31, 1995 DE WITT W. CLINTON
County Counsel

By /s/ Kevin C. Brazile
KEVIN C. BRAZILE
Principal Deputy
County Counsel

Attorneys for Defendant
County of Los Angeles

DECLARATION OF DAVID CONN

If called as a witness I could and would competently testify to all of the facts and information contained herein based upon my own, first-hand, personal knowledge.

1. I am an attorney at law duly licensed and practicing before all of the Courts of the state of California, and I am a Deputy District Attorney with the Los Angeles County District Attorneys Office. I have been employed with the District Attorneys office since 1978, and on March 21, 1994, I was one (1) of two (2) deputy district attorneys assigned as the prosecutors on the case entitled *People v Eric and Lyle Menendez*.

2. On March 21, 1994, Deputy District Attorney Carol Najera and I appeared before the Los Angeles County Grand Jury to question and examine Tracy Baker. Ms. Baker was subpoenaed to appear before the grand jury for investigative purposes only regarding a possible perjury committed by her during the first Menendez murder trial. The grand jury testimony of Ms. Baker began at

10:54 a.m. and was completed at 11:12 a.m. I was in the grand jury hearing room the entire time that Ms. Baker testified before the grand jury, and pursuant to California state law, her attorney remained outside of the grand jury hearing room at all times while she testified.

3. I gave an opening statement to the grand jury before any witness testified and I was present in the grand jury hearing room when the first witness, Beverly Hills Police Department detective Leslie Zoeller testified. The examination of Detective Zoeller was done by Deputy District Attorney Carol Najera. After the testimony of Detective Zoeller, which began at 10:26 a.m. and ended at 10:54 a.m., Tracy Baker was called before the grand jury.

4. When Tracy Baker appeared before the grand jury I believed that her attorney, Paul Gabbert, was outside of the hearing room, but nearby, because by law a witness who testifies before the grand jury is not allowed to have counsel present in the grand jury hearing room. When Tracy Baker was asked by Carol Najera during the grand jury proceeding, "Miss Baker, are you acquainted with the Defendant Lyle Menendez," she responded that she wasn't able to speak with her attorney because he was with the Special Master. Consequently, plaintiff was given permission to exit the grand jury room to confer with her attorney.

5. Pursuant to her request, Ms. Baker exited the grand jury room and returned a few minutes later. I did not do anything to prevent Ms. Baker from leaving the grand jury room to consult her attorney and while she was away I did not interfere or hinder her in consulting with her attorney. Upon her return to the grand jury

hearing room Ms. Baker was asked, once again, "are you acquainted with the defendant Lyle Menendez." In response she replied, "Based on the advice of my counsel, I respectfully decline to answer the question because my answer might tend to incriminate me." In light of the foregoing response, I believed that Ms. Baker had conferred with her attorney after she had left the grand jury proceeding, pursuant to her request; and that her attorney, plaintiff Paul Gabbert, had advised her to assert her Fifth Amendment privilege not to incriminate herself.

6. After Ms. Baker asserted her fifth amendment rights she was asked did she know Lyle Menendez in August of 1989? She responded by stating, "Again, I have to go confer with counsel . . . This is what I have been instructed to do." Consequently, Ms. Baker was again allowed to leave the grand jury proceeding to confer with her attorney. Upon her return to the grand jury proceeding Ms. Baker was again asked did she know Lyle Menendez in August of 1989; and she responded again, "Based on the advice of counsel," I decline to answer the question because my answer might incriminate me. Due to this response I believed that Ms. Baker had once again conferred with her attorney and that he had again advised her not to answer the question.

7. When Ms. Baker was asked whether she brought the documents specified in the subpoena, she asked if she could confer with her attorney again. Ms. Baker was again allowed to be excused from the grand jury and the grand jury took a ten (10) minute recess while she left. After the recess Ms. Baker returned to the grand jury hearing room and then she was advised to proceed to Department 110 of the Superior Court for a contempt

proceeding concerning her failure to produce the documents requested by the grand jury subpoena. It should also be noted that Ms. Baker was represented at the contempt proceeding by her attorney, Paul Gabbert.

8. During Ms. Baker's grand jury testimony she requested on three (3) separate occasions to confer with her attorney. all three (3) of her requests to confer with her attorney were granted and I believed she conferred with her attorney on each occasion because on two (2) occasions she asserted her fifth amendment privilege on, "the advice of counsel," and she never indicated or stated in any manner that she did not confer with her attorney when she was given permission to consult with him. Each time Ms. Baker requested to consult her attorney I did not do anything to prevent either of them from having access to one another. I did not say anything or do anything to prevent plaintiff from giving his client legal advice at any time. Moreover, each time Ms. Baker left the grand jury proceeding to confer with her attorney I remained either in the grand jury hearing room or away from her and plaintiff.

9. On March 21, 1994, a search warrant was issued for plaintiff that authorized Special Master Elliott Oppenheim to conduct a search of plaintiff. I did not order or direct the search of plaintiff by Mr. Oppenheim, because a valid search warrant empowered Oppenheim to search plaintiff. I had no personal participation in the search conducted by Mr. Oppenheim, because I was engaged and before the grand jury, specifically, the examination of Tracy Baker, when Special Master Oppenheim searched plaintiff. In addition, I did not supervise Mr.

Oppenheim's search of plaintiff, because I was before the grand jury when Mr. Oppenheim conducted his search.

10. On March 21, 1994, plaintiff was also searched by Detective Leslie Zoeller for a few minutes. I was present for part of the search conducted by Zoeller and I believe Carol Najera was present as well. Tracy Baker had access to plaintiff immediately before and after the search conducted by Zoeller, because she was not before the grand jury when Zoeller's search began.

I declare all the foregoing to be true and correct under penalty of perjury.

Executed this 28th day of August, 1995 at Los Angeles, California.

/s/ David Conn
DAVID CONN

DECLARATION OF KEVIN C. BRAZILE

I, KEVIN C. BRAZILE, do declare as follows:

1. If called as a witness I could and would competently testify to all of the facts and information contained herein based upon my own first-hand personal knowledge.

2. I am an attorney at law duly licensed and practicing before all of the Courts of the State of California and I am a member of the Los Angeles County Counsels Office, which is the attorney of record for defendants David Conn and Carol Najera in this action.

3. Exhibit "3" contains true and correct copies of excerpts from the deposition transcript of Paul Gabbert and Exhibit "5" contains true and correct copies of excerpts from the deposition transcript of Tracy Baker.

4. Exhibit "2" is a true and correct copy of the entire grand jury testimony of Tracy Baker, and proceeding before the grand jury on March 21, 1994.

5. Exhibit "4" is a true and correct copy of the grand jury bailiff's log for March 21, 1994.

I declare all the foregoing to be true and correct under penalty of perjury.

Executed this 30 day of August, 1995, at Los Angeles, California.

/s/ Kevin C. Brazile
KEVIN C. BRAZILE

DECLARATION OF CAROL NAJERA

If called as a witness I could and would competently testify to all of the facts and information contained herein based upon my own, first-hand, personal knowledge.

1. I am an attorney at law duly licensed and practicing before all of the Courts of the state of California, and I am a Deputy District Attorney with the Los Angeles County District Attorneys Office. I have been employed with the District Attorneys office since 198 , and on March 21, 1994, I was one (1) of two (2) deputy district

attorneys assigned as the prosecutors on the case entitled *People v Eric and Lyle Menendez*.

2. On March 21, 1994, I appeared before the Los Angeles County Grand Jury to question and examine Tracy Baker. Ms. Baker was subpoenaed to appear before the grand jury for investigative purposes only regarding a possible perjury committed by her during the first Menendez murder trial. The grand jury testimony of Ms. Baker began at 10:54 a.m. and was completed at 11:12 a.m. I was in the grand jury hearing room the entire time that Ms. Baker testified before the grand jury, and pursuant to California state law, her attorney remained outside of the grand jury hearing room at all times while she testified.

3. When David Conn gave an opening statement to the grand jury before any witness testified, I was present in the grand jury hearing room. I was also present in the grand jury hearing room, when the first witness, Beverly Hills Police Department detective Leslie Zoeller, testified. The examination of Detective Zoeller was done by me, but Mr. Conn was present as well. After the testimony of Detective Zoeller, which began at 10:26 a.m. and ended at 10:54 a.m., Tracy Baker was called before the grand jury.

4. When Tracy Baker appeared before the grand jury I believed that her attorney, Paul Gabbert, was outside of the hearing room, but nearby, because by law a witness who testifies before the grand jury is not allowed to have counsel present in the grand jury hearing room. When Tracy Baker was asked by me during the grand jury proceeding, "Miss Baker, are you acquainted with the Defendant Lyle Menendez," she responded that she

wasn't able to speak with her attorney because he was with the Special Master. Consequently, plaintiff was given permission to exit the grand jury room to confer with her attorney.

5. Pursuant to her request, Ms. Baker exited the grand jury room and returned a few minutes later. I did not do anything to prevent Ms. Baker from leaving the grand jury room to consult her attorney and while she was away I did not interfere or hinder her in consulting with her attorney. Upon her return to the grand jury hearing room Ms. Baker was asked, once again, "are you acquainted with the defendant Lyle Menendez." In response she replied, "Based on the advice of my counsel, I respectfully decline to answer the question because my answer might tend to incriminate me." In light of the foregoing response, I believed that Ms. Baker had conferred with her attorney after she had left the grand jury proceeding, pursuant to her request; and that her attorney, plaintiff Paul Gabbert, had advised her to assert her Fifth Amendment privilege not to incriminate herself.

6. After Ms. Baker asserted her fifth amendment rights she was asked did she know Lyle Menendez in August of 1989? She responded by stating, "Again, I have to go confer with counsel . . . This is what I have been instructed to do." Consequently, Ms. Baker was again allowed to leave the grand jury proceeding to confer with her attorney. Upon her return to the grand jury proceeding Ms. Baker was again asked did she know Lyle Menendez in August of 1989; and she responded again, "Based on the advice of counsel," I decline to answer the question because my answer might incriminate me. Due to this response I believed that Ms. Baker had once again

conferred with her attorney and that he had again advised her not to answer the question.

7. When Ms. Baker was asked whether she brought the documents specified in the subpoena, she asked if she could confer with her attorney again. Ms. Baker was again allowed to be excused from the grand jury and the grand jury took a ten (10) minute recess while she left. After the recess Ms. Baker returned to the grand jury hearing room and then she was advised to proceed to Department 110 of the Superior Court for a contempt proceeding concerning her failure to produce the documents requested by the grand jury subpoena.

8. During Ms. Baker's grand jury testimony she requested on three (3) separate occasions to confer with her attorney. all three (3) of her requests to confer with her attorney were granted and I believed she conferred with her attorney on each occasion because on two (2) occasions she asserted her fifth amendment privilege on, "the advice of counsel," and she never indicated or stated in any manner that she did not confer with her attorney when she was given permission to consult with him. Each time Ms. Baker requested to consult her attorney I did not do anything to prevent either of them from having access to one another. I did not say anything or do anything to prevent plaintiff from giving his client legal advice at any time. Moreover, each time Ms. Baker left the grand jury proceeding to confer with her attorney I remained either in the grand jury hearing room or away from her and plaintiff.

9. On March 21, 1994, a search warrant was issued for plaintiff that authorized Special Master Elliott

Oppenheim to conduct a search of plaintiff. I did not order or direct the search of plaintiff by Mr. Oppenheim, because a valid search warrant empowered Oppenheim to search plaintiff. I had no personal participation in the search conducted by Mr. Oppenheim. In addition, I did not supervise Mr. Oppenheim's search of plaintiff.

10. On March 21, 1994, plaintiff was also searched by Detective Leslie Zoeller for a few minutes. I was present during the search conducted by Zoeller. Tracy Baker had access to plaintiff immediately before and after the search conducted by Zoeller, because she was not before the grand jury when Zoeller's search began.

I declare all the foregoing to be true and correct under penalty of perjury.

Executed this 28th day of August, 1995 at Los Angeles, California.

/s/ Carol Najera
CAROL NAJERA

DE WITT W. CLINTON, County Counsel
 S. ROBERT AMBROSE, Assistant County Counsel
 KEVIN C. BRAZILE, Principal Deputy Co. Co.
 648 Kenneth Hahn Hall of Administration
 500 West Temple Street
 Los Angeles, California 90012

Attorneys for Defendant(s)
 COUNTY OF LOS ANGELES, et al.,

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NUMBER
Plaintiff(s))	
vs.	)	CV 94-4227-RSWL (Ex)
)	
DAVID CONN, CAROL	)	PROOF OF SERVICE
NAJERA, ELLIOT)	
OPPENHEIM, LESLIE	)	ACKNOWLEDGEMENT
ZOELLER and DOES 1	)	OF SERVICE
through X.)	
Defendant(s))	

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause.

On August 31, 1995, 1995 I served a true copy of:

XXXX DEFENDANTS CONN AND NAJERA'S DECLARATIONS AND EXHIBITS IN SUPPORT OF

THEIR MOTION FOR SUMAMRY [sic] JUDGMENT

By personally delivering it to person(s) indicated below in the manner as provided in F.R.C.P. 5(b)

XXXX By depositing it in the United States Mail, in a sealed envelope with the postage fully prepaid and addressed to the following:

Melissa N. Widdifield	Scott D. MacLatchie
Talcott, Lightfoot,	Franscell, Strickland,
Vandavelde, Woehrle	Roberts & Lawrence
& Sadowsky	225 S. Lake Ave. Penthouse
655 South Hope Street,	Pasadena, Ca. 91101
13th Fl.	
Los Angeles, Ca. 90017	

Place of mailing: 500 W. Temple Street, Los Angeles, California 90012.

Executed on August 31, 1995, 1995, at Los Angeles, California.

/s/ Barbara J. Holmes
 BARBARA J. HOLMES

EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Paul L. Gabbert)	
Plaintiff,)	
vs.	)	CV 94-4227-RSWL (Ex)
David Conn, Carol Najera,)	
Elliot Oppenheim, Leslie)	
Zoeller and Does 1 through	)	ORDER
through X	)	(Filed Sep. 30, 1994)
Defendants)	
_____)	

Two of the defendants in the above captioned action, David Conn and Carol Najera, have moved to dismiss Plaintiff Paul L. Gabbert's 42 U.S.C. § 1983 suit. Defendants Conn and Najera base their Fed. R. Civ. P. 12(b)(6) motion to dismiss on, alternatively: absolute immunity; qualified immunity; and lack of causation. The matter was set for oral argument on September 19, 1994, but was removed from the Court's law and motions calendar pursuant to Fed. R. Civ. P. 78, for disposition based on the papers filed.

Now, having carefully considered all of the papers filed in support of and in opposition to the motion, the Court hereby **GRANTS** in part and **DENIES** in part Defendants' Motion to Dismiss.

I. BACKGROUND

Plaintiff Gabbert is counsel for Tracy Baker, a witness in the recent Menendez brothers murder trial. In March of 1994, Baker was being investigated by the Los Angeles District Attorney's office for perjury during the Menendez trial. Baker was called to testify before a grand jury on this issue.

At the Beverly Hills courthouse on March 21, 1994, as Plaintiff escorted his client to the grand jury hearing, Plaintiff was served with a search warrant by Detective Leslie Zoeller.¹ While Baker testified before the grand jury, Plaintiff's person, briefcase, and accordion file were searched by Special Master Elliot Oppenheim.² Immediately after Oppenheim's search of Plaintiff, Plaintiff was searched again by Detective Zoeller. District attorneys David Conn and Carol Najera, the moving parties in this motion, were present during this second search of Plaintiff.

Plaintiff alleges that the search warrant was obtained illegally, that the material searched was protected by the attorney-client privilege, and that the search went beyond the scope of the warrant. Plaintiff has filed suit under 42

¹ Leslie Zoeller is another defendant in this action but is not a party to this motion to dismiss.

² Oppenheim conducted the first search as a "special master" pursuant to Cal. Penal Code § 1524(c)(1) which requires the appointment of a special master when a search warrant is issued for documentary evidence in the possession of a lawyer. Oppenheim is another defendant in this action, but is not a party to this motion to dismiss.

U.S.C. § 1983,³ claiming constitutional violations including the sixth amendment right to counsel, fourth amendment, and substantive due process violations.

II. DISCUSSION

A. Standard for Dismissal Under Fed. R. Civ. P. 12(b)(6).

In a Rule 12(b)(6) motion to dismiss, the Court must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). A court need not, however, accept conclusory allegations or unreasonable inferences at face value. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.), *cert. denied* 454 U.S. 1031, 102 S. Ct. 567 (1981). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80

³ 42 U.S.C. § 1983 provides that

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

(1957); *see also*, *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

In deciding on a Rule 12(b)(6) motion to dismiss, the court generally may not consider material beyond the pleadings. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994). However, material which is properly submitted as part of the complaint may be considered, and documents whose contents are alleged in a complaint, and whose authenticity is not questioned may also be considered, even if the material is not physically attached to the complaint. *Id.* at 454.

B. Defendants Conn and Najera's First Ground For Dismissal: Absolute Immunity as Prosecutors.

Defendants first move that Plaintiff's § 1983 suit be dismissed against them on the grounds that, as prosecutors, they have absolute immunity from suit under § 1983.

The government official seeking absolute immunity bears the burden of showing that such immunity is justified for the action at issue. *Burns v. Reed*, ___ U.S. ___, 111 S. Ct. 1934, 1939 (1991). There is a presumption that qualified rather than absolute immunity is generally sufficient to protect government officials. *Id.* Absolute immunity is given sparingly. *Id.*

Prosecutors are entitled to absolute immunity from suit under § 1983 for conduct "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 411, 431, 96 S. Ct. 984, 995 (1976). In determining a prosecutor's immunity, the court looks at

the function performed by the prosecutor, rather than the prosecutor's status as prosecutor.

Prosecutorial activities in initiating and pursuing prosecution are "functions to which the reasons for absolute immunity apply with full force," and prosecutors are entitled to absolute immunity when performing those functions. *Id.* However, prosecutors are not protected by absolute immunity when they act as police investigators rather than as advocates preparing for trial. *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S. Ct. 2606, 2616 (1993). In other words, when a prosecutor performs functions generally performed by detectives or police officers, he receives the immunity usually accorded those actions – i.e., qualified, not absolute immunity.

In order for Defendants to prevail on their claim for absolute immunity, they must show that they were functioning as advocates rather than as investigators. The *Buckley* Court found that a prosecutor cannot be acting as an advocate unless, as a threshold question, he has probable cause to initiate judicial proceedings. Even after a determination of probable cause, the prosecutor who engages in police investigative work receives only qualified immunity. 113 S. Ct. at 2616 & n.5. The question is not whether the conduct is related to the decision of whether to prosecute, but "whether the prosecutor's actions are closely associated with the judicial process." *Burns*, 111 S. Ct. at 1944.

Plaintiff argues that Defendants acted as police investigators, rather than advocates, because the "single purpose of the defendants' conduct was to gather evidence." *Opp.* at 12. Defendants' purpose, however, is not the

issue here, in that it is possible for prosecutors to be granted absolute immunity for investigative functions which are connected to their role as advocates. *Imbler*, 424 U.S. at 432, 96 S. Ct. at 995 n.33 (noting that the prosecutor's role as advocate involves conduct preliminary to the initiation of prosecution, including other actions outside the courtroom).

Rather, the issue is Defendants' function during those investigations. Preparation for actions undertaken as an advocate may require investigative and administrative conduct which is shielded as connected to the prosecutor's role as advocate. *Id.* As the Supreme Court has stated, "Drawing a proper line between these functions may present difficult questions." *Id.* Similarly, Plaintiff's assertion that Defendants were engaging in "quintessentially investigative conduct" begs the question of what role Defendants acted in while they were engaging in that conduct.

Plaintiff alleges that Defendants' Conn and Najera delayed Plaintiff at the courthouse under the pretext of supplying Plaintiff with a letter granting his client immunity, until Plaintiff was served with the search warrant. Plaintiff further alleges that Conn and Najera were present when Plaintiff was served with the search warrant, and that Conn introduced Plaintiff to Special Master Oppenheim, who conducted the first search. Lastly, Plaintiff alleges that Conn and Najera were present for the second search and viewed Plaintiff's documents during the search, after Conn informed Plaintiff that Special Master Oppenheim had determined nothing in the briefcase and files was privileged.

Taking all of the above allegations as true, and making all inferences in favor of the non-moving party as is required on a 12(b)(6) motion, the Court finds that the conduct of Defendants Conn and Najera constitutes participation in the investigations. Further, the Court finds that these investigations were not connected to Defendants' role as advocates, but, rather, were pre-indictment evidence-gathering more associated with police functions. For those reasons, the Court **DENIES** Defendants Conn and Najera's claim to absolute immunity.

C. Defendants' Second Claim: Qualified Immunity as Government Officials.

Alternatively, Defendants Conn and Najera move for dismissal of Plaintiff's § 1983 action on the basis of their qualified immunity as government officials. Qualified immunity shields government officials from suit for damages when they perform discretionary functions, and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable official would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). The Ninth Circuit has set out a three prong inquiry for determining qualified immunity: identification of the specific right allegedly violated; determining whether it was so "clearly established" as to alert reasonable officers; and determining the ultimate issue of whether a reasonable officer could have believed the particular conduct was lawful. *Romero v. Kitsap County*, 931 F.2d 624, 627 (9th Cir. 1991). Because this immunity is an immunity from suit, rather than merely a defense to liability, the Supreme Court has stressed the

importance of resolving immunity questions as early as possible in litigation. *Hunter v. Bryant*, ___ U.S. ___, 112 S. Ct. 534 (1991).

1. Plaintiff's Conduct was Discretionary.

In general, only discretionary conduct by government officials is entitled to qualified immunity. *Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737. Plaintiff contends that Defendants are not entitled to qualified immunity because their conduct in searching him was not discretionary. He contends that the Defendants' alleged supervision and participation in the search of Plaintiff was conduct governed by Cal. Penal Code § 1524(c)(2), which provides for special procedures when a search warrant is issued for documentary evidence in possession of an attorney. Plaintiff argues that, because Cal. Penal Code § 1524 is mandatory, Defendants' conduct was ministerial rather than discretionary and thus outside the scope of behavior protected by qualified immunity.

In order for Plaintiff to state a claim under 42 U.S.C. § 1983, Plaintiff must plead a violation of constitutional or federal law. Plaintiff contends this alleged violation of the state statute resulted in the deprivation of his constitutional rights. However, Plaintiff does not specify the constitutional deprivations to which the alleged violation of Cal. Penal Code § 1524 gives rise.

State law cannot be the basis for a § 1983 claim, unless the violation of the state law also results in a constitutional or federal law violation. *Long v. Norris*, 929 F.2d 1111, 1115 (6th Cir. 1991) (noting that "although

Tennessee prison regulations may create a constitutional entitlement under the due process clause of the fourteenth amendment, they cannot change the standard of analysis for constitutional issues arising under the fourth amendment"). Thus, Plaintiff's argument that Defendants have no qualified immunity on the grounds that they acted ministerially does not succeed, because he fails to state a § 1983 claim on that basis. The Court finds that Defendants' conduct was discretionary.

2. Whether Defendants Violated Clearly Established Law.

The real issue in determining whether Defendants should be entitled to qualified immunity is whether the law governing their conduct was clearly established so that a reasonable officer would have known the conduct was unlawful. *Harlow*, 457 U.S. at 818, 102 S. Ct. at 2738. The threshold determination of whether the governing law was clearly established is a matter of law for the court to decide. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 873 (9th Cir. 1993) (citing *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738). However, where material issues of fact are in dispute, the case must proceed to trial. *Id.* at 873.

a. Whether Defendants Were the Cause of the Alleged Deprivations.

Plaintiff alleges numerous constitutional violations. The first issue to be determined, however, is whether Defendants were sufficiently involved in the alleged

unconstitutional conduct to be liable under § 1983. Essentially, Plaintiff alleges that Defendants proximately caused the alleged constitutional violations in two ways: a) they directed or supervised others in the unconstitutional behavior; and b) they directly participated in the second search.

i. Vicarious Liability Not a Basis for a § 1983 Claim

Vicarious liability is not a basis for a § 1983 claim. *Monell v. Dep't. of Soc. Serv.*, 436 U.S. 658, 692, 98 S. Ct. 2018, 2036-37 (1978). However, supervision or direct participation in the unlawful conduct is a basis for liability under § 1983. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

ii. Causation Must Be Proximate.

Section 1983 further requires that a defendant's supervision or participation in the allegedly unconstitutional conduct must be the proximate cause of the deprivation. *Arnold v. Intern. Business Machines*, 637 F.2d 1350, 1355 (9th Cir. 1981).

Defendants contend that Plaintiff has failed to allege any direct participation or supervision on the part of Defendants Conn and Najera. They further contend that Plaintiff fails to show that any supervision or participation by Defendants caused the alleged deprivation of Plaintiff's constitutional rights.

Plaintiff's complaint alleges that Conn directed the search of Plaintiff at the courthouse on March 21, 1994 by

Special Master Oppenheim, as well as the search by Detective Zoeller, and states that Najera and Conn were not only present at the search but also "viewed" documents which were searched. It seems clear that Plaintiff's allegations, taken as true, do state facts showing direction and participation by Defendants. Moreover, it is apparent that such direction and participation would be considered a proximate cause of the constitutional deprivations which Plaintiff alleges. Defendants' lack of causation defense thus fails.

b. Alleged Constitutional Violations.

Plaintiff alleges a number of constitutional deprivations caused by Defendants, including substantive due process, fourth amendment, sixth amendment, and fourteenth amendment deprivations.

i. Fourth Amendment Violations.

a. Invalid Warrant.

Plaintiff alleges that Defendants Conn and Najera deprived him of his fourth amendment right, as incorporated through the fourteenth amendment, to be secure from unreasonable searches by conducting a search under an invalid warrant. The warrant is invalid, Plaintiff alleges, because it contains two material misstatements of fact made with the knowledge they were false. Under *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684-85 (1978), allegations of deliberate misstatements made by the affiant to a warrant entitle the defendant to

an evidentiary hearing on the validity of the warrant. The *Franks* standard also defines the scope of qualified immunity in civil rights actions. *Branch v. Tunnell*, 937 F.2d 1382, 1387 (9th Cir. 1991) (*Branch I*) (citing *Rivera v. United States*, 928 F.2d 592, 604 (2d Cir. 1991)). However, Plaintiff does not allege that the actual affiant, Detective Zoeller, made the statements with the knowledge of their falsity, or with reckless disregard of the truth, as *Franks* requires. 438 U.S. at 171, 98 S. Ct. at 2684.

Additionally, Defendants respond that, even if the false statements were made intentionally or in reckless disregard of the truth, there is sufficient other material in the affidavit to support a finding of probable cause, which under *Franks* excuses the inaccuracies. *Id.* at 171-72, 98 S. Ct. at 2684. Defendants point to the affidavit as containing a statement from Plaintiff's client that the primary object of the search warrant, the alleged letter, had been turned over to Plaintiff.⁴ The affidavit states that Tracy Baker, Plaintiff's client, had informed the affiant that she had turned over the Menendez correspondence to her attorney, Plaintiff. This statement would be enough to support the issuing of the search warrant against Plaintiff Gabbert, even without the allegedly false statements.

Thus, the warrant is valid under either of Plaintiff's arguments, and the search conducted pursuant to it is

⁴ The affidavit and search warrant were attached to Plaintiff's complaint. Material such as subpoenas and search warrants attached as exhibits to plaintiff's complaint may properly be considered on a motion to dismiss. *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (*Branch II*).

likewise valid. The search was not clearly unlawful on the grounds of an invalid warrant, and under *Harlow*, Conn and Najera are entitled to qualified immunity on the charge that the search under the allegedly invalid warrant violated Plaintiff's fourth amendment rights.

b. Impermissibly Broad Execution of Warrant.

Secondly, Plaintiff alleges that Oppenheim's first search violated the fourth amendment because the search went beyond the scope of the warrant.⁵ He further alleges that the second search was invalid because it was "repetitive."

The warrant authorized a search of Plaintiff for "any and all correspondence between Tracy Baker and Lyle Menendez." (Complaint, Ex. C.). Plaintiff alleges that Oppenheim's search of Plaintiff's eyeglass case, memorandum calendar, and wallet/pocketbook went beyond the scope of the warrant because such correspondence would not reasonably be expected to be within those objects.

Police may search all items which legitimately might contain the objects specified in the warrant. *United States v. Grandstaff*, 813 F.2d 1353, 1358 (9th Cir. 1987); *United States v. Disla*, 805 F.2d 1340, 1347 (9th Cir. 1986). The

⁵ The following discussion of Oppenheim's search assumes, without determining, that Defendants Conn and Najera directed that search and thus were a cause of the alleged constitutional deprivation.

warrant in question was for "correspondence." By definition, correspondence may include letters and notes on small pieces of paper. Such small pieces of paper might have been placed within Plaintiff's eyeglass case, wallet, or calendar. The search of Plaintiff therefore did not go beyond the scope of the warrant and thus was not a violation of the fourth amendment on those grounds. On these grounds, Plaintiff cannot show that the search was clearly unlawful so as to overcome Defendants' claim to qualified immunity under *Harlow*.

Plaintiff further alleges that the second search of his personal effects was unauthorized by the warrant because it was "repetitive" and thus violated his rights under the fourth amendment. Plaintiff cites no case law to support his proposition that such searches are unreasonable. On the contrary, courts have allowed "second" searches under the same warrant, as long as the subsequent search could be considered a continuation of the first search. *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990) (holding that officer who visited defendant's offices to obtain specific files was allowed to return several hours later; second entry was considered continuation of the search); *United States v. Carter*, 854 F.2d 1102, 1107 (8th Cir. 1988) (officer's return to a motel room, several hours after a search, was valid because the authority of the search warrant had not expired).

The second search conducted by Zoeller on Plaintiff occurred soon after the first search conducted by Oppenheim, and thus would be considered a continuation of Oppenheim's search under *Kaplan*. In any event, the second search was not clearly unlawful so that a reasonable officer should have known it was illegal. The

second search, like the first search, therefore does not meet the *Harlow* test for overcoming qualified immunity.

c. Violation of Cal. Penal Code § 1524

Plaintiff alleges that the search was unconstitutional on a third ground, because it was allegedly conducted in violation of Cal. Penal Code § 1524, as discussed above in section II.C.1. Again, a § 1983 claim must be premised on the violation of federal law or constitutional provision. *Long v. Norris*, 929 F.2d at 1114. The violation of Cal. Penal Code § 1524 in and of itself does not constitute a fourth amendment violation, nor does Plaintiff clearly allege that his substantive due process rights were violated by the alleged violation of the state statute. Officials sued for constitutional violations do not lose their qualified immunity in § 1983 actions merely because their conduct violates some state statutory or administrative provision. *Davis v. Scherer*, 468 U.S. 183, 194, 104 S. Ct. 3012, 3019 & n.12 (1984). The violating conduct must violate clearly established federal law. *Elder v. Holloway*, ___ U.S. ___, 114 S. Ct. 1019, 1023 (1994) (unanimous decision).

Even if Plaintiff alleged that Defendants' failure to follow the procedural requirements of Cal. Penal Code § 1524 constituted a fourteenth amendment deprivation, his claim would fail. While state law may create a property interest protected by the fourteenth amendment, a substantive property right cannot exist exclusively by virtue of a procedural right. *Dorr v. County of Butte*, 795 F.2d 875, 876, 877 (9th Cir. 1986).

ii. Intrusion into Client Relationships as a Sixth Amendment Violation

Plaintiff alleges that Defendants, by causing the search warrant to be served upon him and participating in the search, rendered him incommunicado from his client who was simultaneously testifying before the grand jury, thereby violating his client's sixth amendment right to effective counsel.

a. Plaintiff's Standing to Raise His Client's Sixth Amendment Claim

Plaintiff has standing to assert his client Baker's sixth amendment claims⁶ under Wounded Knee Legal Defense/Offense Com. v. FBI, 507 F.2d 1281, 1284 (8th Cir. 1974) ("[A] lawyer has standing to challenge any act which interferes with his professional obligation to his client and thereby, through the lawyer, invades the client's constitutional right to counsel."); *Keker v. Procunier*, 398 F. Supp. 756, 765 (E.D. Cal. 1975) (counsel forced to meet their imprisoned clients in poor conditions had standing to raise their clients' sixth amendment claims).

⁶ The record does not state whether or not Baker is actually a defendant in a criminal proceeding, although it appears that she was the object of a grand jury investigation. A violation of the attorney-client privilege implicates the sixth amendment only when it applies to the relationship between a criminal defendant and his attorney. *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992).

b. Interference with Attorney-Client Relationship and Prevention of Effective Counsel as a Sixth Amendment Violation

The question here is whether, for purposes of the *Harlow* test for qualified immunity, the law governing Defendants' behavior in searching Plaintiff and arguably interfering with his client's sixth amendment right to counsel was clearly established.

Plaintiff alleges that the serving of the search warrant upon him just as his client was called to testify in front of the grand jury was an interference with his client's sixth amendment right to effective assistance of counsel. Because of the serving of the search warrant and Oppenheim's subsequent search of Plaintiff, Plaintiff claims that his client was prevented from consulting with him immediately before and during her grand jury testimony. Plaintiff argues that this constitutes a violation of the Sixth Amendment.

Leaving aside the causation question of whether Defendants Conn and Najera were actually involved in timing the service of the search warrant to interfere with Plaintiff's representation of his client, the issue is whether such alleged interference is a violation of Baker's sixth amendment right to effective counsel. Governmental interference with the attorney-client relationship will constitute a violation of the sixth amendment only if the interference substantially prejudices the defendant. *United States v. Irwin*, 612 F.2d 1182, 1186-1187 (9th Cir. 1980); see *United States v. Glover*, 596 F.2d 857, 863-64 (9th

Cir. 1979). Plaintiff makes no allegation that his client was substantially prejudiced by his unavailability. For that reason, the law is not clearly established that Defendants' alleged interference⁷ with Plaintiff's representation of his client was unlawful. Under *Harlow*, Defendants Conn and Najera are thus entitled to qualified immunity on this issue.

c. Defendant's Contact of Plaintiff's Client as a Violation of Sixth Amendment

Plaintiff further alleges that Defendants Conn and Najera violated his client's sixth amendment rights by questioning her during a search of her home on March 18, 1994, despite knowing that she was represented by counsel, in violation of Cal. Prof. R. Conduct 2-100 (West Supp. 1994). Cal. Prof. R. Conduct 2-100 (A) provides that

While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

This rule has been found to apply to prosecutors pursuing a criminal case. *United States v. Lopez*, 4 F.3d 1455, 1459 (9th Cir. 1993). However, while Defendants Conn and Najera are bound by this rule and allegedly may

⁷ Again, the Court assumes without determining that causation exists, even though Defendants Conn and Najera's causation of the alleged interference is far from clear.

have violated it, Plaintiff does not allege that this violation "substantially prejudiced" his client so that, under *United States v. Irwin*, his client's sixth amendment rights have been violated. Further, as discussed above, violations of state law do not provide a claim under § 1983 unless the violations in some way implicate a violation of constitutional rights.

d. Invasion of Attorney-Client Privilege.

Plaintiff alleges that the search of his briefcase and files invaded the attorney-client privilege because privileged documents were viewed during the searches, and that his clients' sixth amendment rights were violated as a result. Plaintiff's allegations again fail to state a clearly established constitutional violation.⁸ "[S]tanding alone, the attorney-client privilege is merely a rule of evidence; it has not yet been held a constitutional right." *Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992) (quoting *Clutchette v. Rushen*, 770 F.2d 1469, 1471 (9th Cir. 1985)). Unless the interference with the attorney-client privilege substantially prejudices the defendant, an intrusion on the confidential relationship between a defendant and his attorney does not constitute a sixth amendment violation.

⁸ Plaintiff alleges that not only Baker's files but other clients' files were viewed during this search. Plaintiff's clients whose files were viewed may have a privacy interest in the files, but Plaintiff does not have standing to raise his clients' fourth amendment claims. *DeMassa v. Nunez*, 770 F.2d 1505, 1506, 1507 (9th Cir. 1985).

Partington, 961 F.2d at 863; *Clutchette*, 770 F.2d at 1471 (citing *United States v. Irwin*).

Thus, case law does not establish that Defendants' conduct was clearly a violation of the sixth amendment. Again, Plaintiff fails to allege that his client was substantially prejudiced by Defendant's alleged interference with the attorney-client privilege. Thus, under *Harlow*, Defendants have a qualified immunity to Plaintiff's claim.

iii. Plaintiff's Fourteenth Amendment Right to Practice His Profession

Plaintiff alleges that Defendants' conduct interfered with his fourteenth amendment interest in practicing his profession. Such a right has been found to exist. *Keker v. Procunier* [sic], 398 at 756; see *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). At least one district court has found that prison officials impermissibly interfered with attorneys' fourteenth amendment rights when attorneys were forced to meet their clients in an overly warm interview room in which glass partitions hampered attorneys' ability to consult with their clients. *Kecker* [sic], 398 F. Supp. at 761.

To show that a right allegedly violated is "clearly established by law" under the *Harlow* test,

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held

unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 3039 (1987) (citations omitted).

Defendants' alleged plan to serve the search warrant upon Plaintiff as his client began testifying before the grand jury is arguably an interference with Plaintiff's fourteenth amendment right to practice his profession. Plaintiff contends that as a result of the serving of the search warrant and the subsequent search, he was prevented from advising his client immediately before and during the grand jury hearing, when his client specifically twice sought to consult with him. Additionally, when Plaintiff stated that his client's appearance needed to be delayed during his search, his client was instead ordered to immediately appear in front of the grand jury.

Viewing the evidence most favorably for Plaintiff on this motion to dismiss, the Court finds that Defendants did violate Plaintiff's clearly established fourteenth amendment right to practice his profession free from undue governmental interference. The Court thus DENIES Plaintiff's motion to dismiss this claim.

c. Substantive Due Process "Shocks the Conscience" Claim.

Lastly, Plaintiff claims that Defendants' conduct is so egregious that it "shocks the conscience" and violates substantive due process notions of decency and fairness. This "shock the conscience" test was first expressed in *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209

(1952), where police officers in search of evidence forcibly pumped the stomach of a criminal suspect. This type of substantive due process claim has most often been invoked in relation to police brutality and unwanted body manipulation, but has also been applied to relentless questioning of a suspect. *Cooper v. Dupnik*, 963 F.2d 1220, 1249, 1250 (9th Cir. 1992).

The Supreme Court has not set out specific standards for the test. *Id.* The Court finds here that Defendants' alleged conduct was not so lacking indecency and fairness that their actions violated Plaintiff's substantive due process right. Thus, Defendants have qualified immunity for Plaintiff's substantive due process claim.

D. Qualified Immunity No Defense to Injunctive Relief

Qualified immunity is not a defense to a claim for injunctive relief. *American Fire v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991). Plaintiff petitions for both damages and injunctive relief. As discussed above, Plaintiff's claim for damages should be dismissed on the grounds that Defendants have qualified immunity which protects them from civil suits for damages, but Plaintiff's claim for injunctive relief is more appropriately considered on a motion for summary adjudication.

E. Leave to Amend Complaint

Fed. R. Civ. P. 15(a) states that leave to amend pleadings "shall be freely given when justice so requires." However, leave may be denied when amendment would

cause undue delay, would be made in bad faith, would be futile, or would cause prejudice to the opposing party. *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973). Leave to amend need not be granted if the court determines that allegation of other facts consistent with the challenged pleading could not correct the deficiency. *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988); *Schreiber Dist. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

In this case, the Court determines that it would be futile to grant Plaintiff leave to amend his pleadings in regard to his First Claim for damages, which alleges fourth amendment violations, and his Second Claim for damages, subsections (c) (alleged violation of fourth and fourteenth amendments based on Cal. Penal Code § 1524) (e) (alleged violation of sixth and fourteenth amendment based on Cal. R. Prof. Conduct 2-100), and (f) (alleged violation of attorney-client privilege). The Court thus dismisses those claims without leave to amend.

IV. CONCLUSION

Defendants Conn and Najera's Rule 12(b)(6) motion to dismiss is hereby **DENIED** as to subsection (d) of Plaintiff's Second Claim for the violation of his fourteenth amendment right to practice his profession, and as to Plaintiff's claims for injunctive and declaratory relief. Defendants' Rule 12(b)(6) motion to dismiss is hereby **GRANTED** on the basis of qualified immunity as to Plaintiff's remaining claims for damages against Defendants Conn and Najera. Plaintiff's claims for fourth amendment violations, violations of the attorney-client

privilege, violations of Cal. Rule Prof. Conduct 2-100, and violations of Cal. Penal Code § 1524 are **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED.

RONALD S W LEW
RONALD S.W. LEW
 United States District Judge

DATED: September 27, 1994

CV 94-4227-RSWL *Gabbert v. Conn, Najera et al.*, Defendants Conn and Najera' 12(b)(6) motion to dismiss.

(Gabbert1.order\J)

EXHIBIT 2

THE GRAND JURY OF THE
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

IN RE THE GRAND JURY	)	CASE NO. (NONE)
INVESTIGATION)	
(SECRET))	
WITNESS: TRACI LE BAKER.)	
)	

REPORTER'S TRANSCRIPT OF
GRAND JURY PROCEEDINGS

MONDAY, MARCH 21, 1994

APPEARANCES:

DAVID CONN, CAROL NAJERA, DEPUTIES
DISTRICT ATTORNEY OF THE COUNTY OF
LOS ANGELES, REPRESENTING THE OFFICE
OF THE DISTRICT ATTORNEY. TERRY L.
WHITE, DEPUTY DISTRICT ATTORNEY OF
LOS ANGELES COUNTY AND LOS ANGELES
COUNTY GRAND JURY ADVISOR.

RICHARD B. COLBY, CSR 1080, DULY
APPOINTED AND SWORN AS THE OFFICIAL
STENOGRAPHIC REPORTER OF THE LOS
ANGELES COUNTY GRAND JURY.

[p. 1] LOS ANGELES, CALIFORNIA;
MONDAY, MARCH 21, 1994

10:20 A.M.

(AT THE BEGINNING OF
THESE PROCEEDINGS, 19
GRAND JURORS WERE PRESENT.)

THE FOREPERSON: THIS HEARING IS NOW
IN SESSION.

MADAME SECRETARY, WHAT IS THE STATUS OF
THE ROLL?

(ROLL CALLED.)

THE SECRETARY: LET THE RECORD
REFLECT THERE ARE NINETEEN GRAND JURORS
PRESENT THIS MORNING.

THE FOREPERSON: GOOD MORNING, MR.
COLBY. PLEASE RAISE YOUR RIGHT HAND. I WILL
NOW SWEAR IN THE COURT REPORTER.

(THE GRAND JURY COURT REPORTER,
RICHARD B. COLBY, WAS SWORN AS FOLLOWS:)

THE FOREPERSON: YOU DO SOLEMNLY
SWEAR THAT YOU WILL CORRECTLY TAKE IN
SHORTHAND AND CORRECTLY TRANSCRIBE, TO
THE BEST OF YOUR ABILITY, ALL OF THE TESTI-
MONY GIVEN BY EACH AND EVERY WITNESS TESTI-
FYING IN THE MATTER NOW PENDING BEFORE THIS
GRAND JURY, AND THAT YOU WILL KEEP SECRET
AND DIVULGE [p. 2] TO NO ONE ANY OF THE PRO-
CEEDINGS OF THIS GRAND JURY, SO HELP YOU GOD.

THE REPORTER: I DO.

THE FOREPERSON: I WILL NOW READ THE FORE STATEMENT.

(READING:)

"FOR INVESTIGATIVE PURPOSES ONLY:

"THE DISTRICT ATTORNEY'S OFFICE IS NOT SEEKING AN INDICTMENT AT THIS TIME.

"CRIMINAL INVESTIGATION.

"MATTERS TO BE CONSIDERED IN CONNECTION WITH THE INVESTIGATION:

"THE DISTRICT ATTORNEY'S OFFICE WILL BE QUESTIONING A WITNESS WHO TESTIFIED AS A DEFENSE WITNESS DURING THE MENENDEZ MURDER TRIAL.

"THIS HEARING WILL BE REGARDING POSSIBLE PERJURY COMMITTED BY THE WITNESS DURING THE AFOREMENTIONED TRIAL.

"TENTATIVE WITNESS LIST:

"TRACI BAKER.

"THE GRAND JURORS WILL PLEASE ADD TO THEIR TENTATIVE WITNESS LIST DETECTIVE LES ZOELLER FROM THE BEVERLY HILLS POLICE DEPARTMENT.

"ANY MEMBER OF THE GRAND JURY [p. 3] WHO HAS A STATE OF MIND IN REFERENCE TO THE CASE, OR TO ANY OF THE PARTIES INVOLVED, WHICH

WILL PREVENT HIM OR HER FROM ACTING IMPARTIALLY AND WITHOUT PREJUDICE TO THE SUBSTANTIAL RIGHTS OF ANY OF THE SAID PARTIES, WILL NOW RETIRE."

THE SECRETARY: LET THE RECORD REFLECT THAT NO GRAND JUROR HAS RETIRED.

THE FOREPERSON: GOOD MORNING AND WELCOME TO THE GRAND JURY, DEPUTY DISTRICT ATTORNEY DAVID CONN.

MR. CONN: GOOD MORNING.

THE FOREPERSON: ALSO, DEPUTY DISTRICT ATTORNEY CAROL NAJERA WILL BE JOINING US MOMENTARILY.

DO YOU HAVE AN OPENING STATEMENT?

MR. CONN: YES, I DO.

THE FOREPERSON: YOU MAY PROCEED.

MR. CONN: THANK YOU.

OPENING STATEMENT

BY MR. CONN:

GOOD MORNING, LADIES AND GENTLEMEN.

I'M SURE THAT ALL OF YOU ARE FAMILIAR WITH THE PROSECUTION OF PEOPLE VS. LYLE AND ERIC MENENDEZ. IT WAS A WELL-PUBLICIZED HOMICIDE PROSECUTION HERE IN THE COUNTY OF LOS ANGELES.

THE TWO DEFENDANTS IN THIS CASE WERE CHARGED WITH THE MURDER OF THEIR PARENTS, KITTY AND JOSE MENENDEZ.

THE CASE WAS TRIED RECENTLY IN LOS ANGELES [p. 4] SUPERIOR COURT AND IT RESULTED IN A HUNG JURY. THE CASE IS CURRENTLY AWAITING RETRIAL AT THIS TIME.

BOTH DEFENDANTS ARE CHARGED WITH TWO COUNTS OF FIRST DEGREE MURDER WITH SPECIAL CIRCUMSTANCES, WHICH MAKES THEM ELIGIBLE FOR THE DEATH PENALTY.

THEY ARE ALSO CHARGED WITH THE CRIME OF CONSPIRACY TO COMMIT MURDER.

THE JURY IN THAT CASE HUNG AS TO ALL THREE COUNTS; THAT IS, THEY WERE UNABLE TO AGREE AS TO ALL THREE COUNTS.

IT WAS THE CONTENTION OF THE PROSECUTION IN THAT CASE THAT THE DEFENSE PRESENTED BY THE DEFENDANTS WAS UNRELIABLE AND WAS, IN FACT, CONTRIVED.

THE DEFENSE IN THAT CASE ESSENTIALLY WAS A DEFENSE THAT THE DEFENDANTS HAD BEEN ABUSED BY THEIR PARENTS FOR A NUMBER OF YEARS AND THAT THIS ABUSE RESULTED IN THE DEFENDANTS KILLING THEIR PARENTS.

IT WAS NOT ARGUED THAT THE DEFENDANTS WERE NOT GUILTY AS A RESULT OF THEIR CONDUCT.

NOT GUILTY WAS NOT AN OPTION.

THE SOLE CONSIDERATION BEFORE THE JURYS IN THAT CASE - THEY DID HAVE TWO SEPARATE JURYS - WAS THE QUESTION OF WHAT DEGREE OF HOMICIDE THE DEFENDANTS SHOULD BE FOUND GUILTY OF.

THE THREE OPTIONS THAT WERE BEFORE THE JURY WAS:

FIRST DEGREE MURDER;

SECOND DEGREE MURDER; AND,

[p. 5] VOLUNTARY MANSLAUGHTER.

THE OPTION OF NOT GUILTY WAS NOT BEFORE THE JURY.

THE JURY SPLIT IN VARIOUS WAYS, SOME OPTING FOR FIRST DEGREE MURDER, SOME OPTING FOR SECOND DEGREE MURDER AND SOME OPTING FOR VOLUNTARY MANSLAUGHTER.

WHAT WE INTEND TO DO, LADIES AND GENTLEMEN, IS TO PRESENT EVIDENCE BEFORE THE GRAND JURY THAT WOULD TEND TO SHOW THAT SOME OF THE WITNESSES WHO TESTIFIED FOR THE DEFENSE TESTIFIED FALSELY.

ONE OF THE WITNESSES THAT WE WILL BE PRESENTING TODAY IS A WOMAN BY THE NAME OF TRACI BAKER.

THE DEFENSE IN THE MENENDEZ CASE WAS THAT YEARS OF ABUSE HAD LED TO THE HOMICIDE.

AND ONE OF THE AREAS, ONE OF THE INCIDENTS WHICH WAS USED BY THE DEFENSE TO PRESENT THIS ABUSE TO THE JURY WAS AN INCIDENT IN WHICH KITTY MENENDEZ ALLEGEDLY TRIED TO POISON HER FAMILY.

THAT WAS USED AS A MATERIAL PART OF THEIR CASE TO ESTABLISH THAT KITTY MENENDEZ WAS AN UNSTABLE WOMAN AND, THAT AS A RESULT, SHE WAS LIKELY TO KILL HER SONS OR AT LEAST PARTICIPATE IN THE KILLING OF HER SONS BY HER HUSBAND, JOSE MENENDEZ.

TO ESTABLISH THAT INCIDENT, THE DEFENSE CALLED A WITNESS BY THE NAME OF TRACI BAKER.

TRACI BAKER TESTIFIED BEFORE THE JURY UNDER OATH, AND WHAT SHE SAID WAS THAT SHE RECALLS AN INCIDENT IN WHICH SHE WAS AT THE MENENDEZ HOME, WHICH SHE RELATED TO [p. 6] THE JURY.

SHE SAID THAT SHE IS A FRIEND OF LYLE AND ERIC MENENDEZ; THAT SHE HAD A RELATIONSHIP, A CLOSE PERSONAL RELATIONSHIP WITH LYLE MENENDEZ, AND, AS A RESULT OF THAT RELATIONSHIP, SHE SPENT A SUBSTANTIAL AMOUNT OF TIME AT THE MENENDEZ HOME IN LATE 1988.

THE MURDER OCCURRED IN 1989.

SHE RECALLED AN INCIDENT IN WHICH SHE WAS IN THE FAMILY DINING ROOM. SHE WAS THERE WITH ERIC AND LYLE MENENDEZ AND JOSE MENENDEZ, THEIR FATHER, AND SHE RECALLS THAT

THE ONLY OTHER PERSON PRESENT WAS KITTY MENENDEZ.

KITTY MENENDEZ WAS BRINGING FOOD IN FROM THE KITCHEN TO THE TABLE.

AND SHE RECALLS THAT DURING THIS INCIDENT, JOSE MENENDEZ SUDDENLY PUSHED THE FOOD AWAY FROM THE TABLE, KNOCKING OVER VARIOUS THINGS IN FRONT OF HIM AND SAID SOMETHING TO THE EFFECT OF, "WHAT DID YOU DO TO THE FOOD?"

HE BECAME EXTREMELY ANGRY, AND AT THAT POINT HE SAID TO HIS SONS, "COME ON. WE ARE GETTING OUT OF HERE."

AT THAT POINT, HE LEFT THE TABLE AND HE SUMMONED LYLE MENENDEZ AND ERIC MENENDEZ TO FOLLOW ALONG WITH HIM, AND TRACI BAKER, IN TURN, WAS SUMMONED BY LYLE AND SHE WENT OUTSIDE.

THEY ALL MET OUTSIDE THE HOUSE AND JOSE MENENDEZ TOOK THEM TO HAMBURGER HAMLET, A NEARBY RESTAURANT, TO HAVE DINNER.

AFTER THEY GOT INTO THE CAR, SHE AND LYLE BEING IN THE BACK SEAT AND ERIC BEING IN THE FRONT SEAT WITH [p. 7] JOSE, ERIC SAID TO JOSE SOMETHING TO THE EFFECT OF, "WHAT DO YOU THINK SHE TRIED TO DO, DAD?"

AND JOSE SAID, "I DON'T KNOW. BUT I JUST DON'T TRUST HER TODAY."

THIS INCIDENT WAS ARGUED BY THE DEFENSE AS EVIDENCE OF THE FACT THAT KITTY MENENDEZ TRIED TO POISON HER FAMILY, AND IT CONTRIBUTED TO THE DEFENSE THEORY, AS I SAID, THAT SHE WAS AN UNSTABLE WOMAN.

LADIES AND GENTLEMEN, SOME TIME AFTER THE CASE WENT TO THE JURY AND THE JURY BEGAN THEIR DELIBERATIONS, THE INVESTIGATING OFFICER IN THIS CASE CAME ACROSS A LETTER. IT WAS THE FIRST TWO PAGES OF A LETTER, AND HE LATER CAME ACROSS A THIRD PAGE.

HE RECEIVED TWO PAGES FROM A WRITER BY THE NAME OF DOMINIC DUNN. IT WAS A XEROX COPY OF A LETTER. AND HE FELT THAT IF HE INTERVIEWED ANOTHER WITNESS, HE MIGHT BE ABLE TO OBTAIN MORE OF THE LETTER FROM THAT WITNESS.

SO HE WENT TO THAT WITNESS AND HE ASKED THAT WITNESS IF SHE HAD ANY PART OF THAT LETTER. AND, IN FACT, SHE INDICATED THAT SHE DID HAVE PART OF THAT LETTER. SHE HAD THREE PAGES OF THAT LETTER.

SHE PROVIDED TO THE INVESTIGATING OFFICER A XEROX COPY OF THE XEROX COPY THAT SHE HAD.

THIS LETTER, LADIES AND GENTLEMEN, WAS SUBMITTED TO A HANDWRITING EXPERT, AND THE EXPERT SAID, AFTER COMPARING THIS LETTER TO OTHER DOCUMENTS WRITTEN BY LYLE MENENDEZ, THAT THEY COULD TELL THAT THIS LETTER WAS,

IN FACT, WRITTEN BY LYLE MENENDEZ. THIS LETTER IS IN HIS [p. 8] HANDWRITING.

AND WHAT IT IS, IT IS A LETTER DATED FEBRUARY 5 TO TRACI BAKER. AND IN THIS LETTER HE PURPORTS TO TELL TRACI BAKER EXACTLY WHAT TO TESTIFY TO.

YOU WILL HEAR THE DETAILS OF THE LETTER FROM THE INVESTIGATING OFFICER WHO WILL TESTIFY TO THE CONTENTS OF THE LETTER.

BUT JUST TO QUICKLY SUMMARIZE IT, IT SAYS SOMETHING TO THE EFFECT OF:

I WANT YOU TO DO SOMETHING FOR ME. IT MAY NOT SEEM IMPORTANT TO YOU, YOU MAY NOT UNDERSTAND THE SIGNIFICANCE OF IT, BUT, BELIEVE ME, IT WILL HELP MY CASE.

THERE WERE TWO INCIDENTS THAT I WANT YOU TO REMEMBER.

THE FIRST INCIDENT WAS AN INCIDENT IN MY HOUSE. YOU WERE SITTING THERE AT THE TABLE. ERIC AND MY FATHER WERE THERE. MY MOTHER WAS BRINGING FOOD IN TO THE TABLE.

SUDDENLY, MY FATHER, WITHOUT PROVOCATION, PUSHED THE FOOD AWAY AND SAID, "WHAT ARE YOU DOING TO THIS FOOD," OR, "WHAT HAVE YOU DONE TO THIS FOOD?"

AT THAT POINT, WE STOOD UP AND WE WENT OUTSIDE.

WE WENT TO HAMBURGER HAMLET.

[p. 9] AT HAMBURGER HAMLET - BEFORE WE GOT TO HAMBURGER HAMLET, ERIC SAID TO MY FATHER, "WHAT DO YOU THINK SHE TRIED TO DO, DAD?" AND SO ON AND SO FORTH.

FACTS WHICH INDICATE THAT TRACI BAKER WAS TOLD WHAT TO SAY.

AND THERE ARE OTHER ASPECTS OF THAT LETTER WHICH MAKE IT CLEAR THAT THIS WAS NOT AN ATTEMPT BY MR. MENENDEZ TO REFRESH THE WITNESS' RECOLLECTION, BUT THAT HE WAS PUTTING WORDS IN HER MOUTH, STATEMENTS LIKE:

"YOU DON'T REMEMBER THE DETAILS, YOU DON'T REMEMBER THE DATE, BUT I WILL SUPPLY YOU WITH THAT DATE AT A FUTURE TIME." AND SO ON AND SO FORTH.

VARIOUS STATEMENTS WHICH, TAKEN TOGETHER, LEAD ONE TO THE CONCLUSION THAT LYLE MENENDEZ SUBORNED PERJURY OF TRACI BAKER AND THAT SHE TESTIFIED FALSELY.

AS I SAID, WE WILL ALSO SHOW THAT THIS WAS MATERIAL TO THE DEFENSE AND CONTRIBUTED TO THE DEFENSE'S ARGUMENT.

AT THIS TIME, LADIES AND GENTLEMEN, WE ARE NOT SEEKING AN INDICTMENT. WE WISH TO INVESTIGATE THIS FULLY.

THERE ARE A NUMBER OF WITNESSES WHO WE SHOULD SPEAK TO BEFORE WE MAKE A DETERMINATION AS TO WHETHER OR NOT WE WILL SEEK AN INDICTMENT AND AGAINST WHOM.

AT THE VERY LEAST, WE CAN START WITH THE INVESTIGATING OFFICER, LES ZOELLER, L-E-S ZOELLER.

[p. 10] MR. ZOELLER WILL TESTIFY HE ATTENDED THE TRIAL OF THE TWO MENENDEZ BROTHERS AND THAT HE HEARD THE WITNESS TRACI BAKER TESTIFY; AND, THAT DURING HER TESTIMONY, SHE TESTIFIED TO THIS INCIDENT UNDER OATH.

HE WILL ALSO SAY THAT HE UNCOVERED THE LETTER FROM THE WITNESS AND HE WILL TESTIFY TO THE CONTENTS OF THAT LETTER.

NOW, WE ALSO HAVE TRACI BAKER HERE TODAY AND I WILL CALL TRACI BAKER TO THE STAND.

BUT I ANTICIPATE AT THIS TIME, AFTER SPEAKING TO HER ATTORNEY, THAT SHE WILL BE TAKING THE FIFTH AMENDMENT AT THIS POINT.

THAT IS WHAT WE HAVE TODAY.

WE HOPE IN THE FUTURE WE WILL BE ABLE TO PRESENT ADDITIONAL WITNESSES CONCERNING THIS MATTER.

THANK YOU VERY MUCH, LADIES AND GENTLEMEN.

THE FOREPERSON: THE JURORS ARE REMINDED THAT THE FOREMAN'S STATEMENT AND THE OPENING STATEMENT BY THE DEPUTY DISTRICT ATTORNEY ARE NOT EVIDENCE IN THIS CASE

AND ARE NOT TO BE CONSIDERED AS EVIDENCE BY ANY MEMBER OF THE GRAND JURY.

THE FOREPERSON: DEPUTY DISTRICT ATTORNEY CONN, YOU MAY PROCEED.

MR. CONN: YES.

AT THIS TIME I WOULD ASK THAT LES ZOELLER, WHO IS OUTSIDE, BE PERMITTED TO ENTER, ALONG WITH DEPUTY DISTRICT ATTORNEY CAROL NAJERA, WHO WILL DO THE QUESTIONING.

[p. 11] THE FOREPERSON: DETECTIVE LES ZOELLER?

THE WITNESS: THAT'S CORRECT.

THE FOREPERSON: PLEASE RAISE YOUR RIGHT HAND.

YOU DO SOLEMNLY SWEAR THE TESTIMONY YOU ARE ABOUT TO GIVE IN THE MATTER NOW PENDING BEFORE THE GRAND JURY OF THE COUNTY OF LOS ANGELES SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD.

THE WITNESS: I DO.

THE FOREPERSON: PLEASE BE SEATED.

DETECTIVE ZOELLER, PLEASE STATE AND SPELL YOUR FULL NAME, SPEAKING DIRECTLY INTO THE MICROPHONE.

THE WITNESS: LESLIE H. ZOELLER.

L-E-S-L-I-E Z-O-E-L-L-E-R.

THE FOREPERSON: GOOD MORNING, DEPUTY DISTRICT CAROL NAJERA.

YOU MAY PROCEED.

MS. NAJERA: THANK YOU, MADAME FOREPERSON.

LESLIE H. ZOELLER, CALLED AS A WITNESS BEFORE THE LOS ANGELES COUNTY GRAND JURY, WAS DULY SWORN AND TESTIFIED AS FOLLOWS:

EXAMINATION

BY MS. NAJERA:

Q. MR. ZOELLER, WHAT IS YOUR OCCUPATION?

A. POLICE OFFICER FOR THE CITY OF BEVERLY HILLS, ASSIGNED TO THE DETECTIVE DIVISION.

Q. SIR, WERE YOU RESPONSIBLE TO INVESTIGATE THE [p. 12] CASE OF PEOPLE VERSUS ERIC GALEN MENENDEZ AND JOSEPH LYLE MENENDEZ?

A. YES.

Q. AND WERE YOU PRESENT AT THE TRIAL OF ERIC GALEN MENENDEZ AND JOSEPH LYLE MENENDEZ?

A. YES, I WAS.

Q. DO YOU KNOW AN INDIVIDUAL BY THE NAME OF TRACI BAKER?

A. YES, I DO.

Q. WILL YOU PLEASE DESCRIBE HER FOR THIS GRAND JURY.

A. A WHITE FEMALE, APPROXIMATELY 28 YEARS OLD, DARK HAIR.

SHE'S WAITING OUT IN THE NEXT ROOM AND SHE'S WEARING A DARK BLUE SUIT.

Q. IS IT YOUR UNDERSTANDING THAT SHE MAY BE TESTIFYING TODAY?

A. YES, IT IS.

Q. NOW, ON OCTOBER 12, 1993, DID TRACI BAKER APPEAR IN VAN NUYS SUPERIOR COURT, DEPARTMENT "N"?

A. YES, SHE DID.

Q. AND DID SHE TAKE AN OATH TO TELL THE TRUTH AT THAT TIME?

A. SHE DID.

Q. WAS THIS OATH ADMINISTERED BY THE CLERK OF THE COURT?

A. YES, IT WAS.

D. DID MISS BAKER TESTIFY?

[p. 13] A. YES, SHE DID.

MS. NAJERA: MADAME FOREMAN, I HAVE A DOCUMENT WHICH I WOULD LIKE MARKED AS PEOPLE'S 1 FOR IDENTIFICATION.

IT APPEARS TO BE A REPORTER'S TRANSCRIPT OF THE PROCEEDINGS OF OCTOBER 12, 1993, PAGES 12352 TO 12386.

MAY IT BE SO MARKED?

THE FOREPERSON: SO ORDERED.

(MARKED FOR I.D.: = EXHIBIT 1.)

MS. NAJERA: MAY I APPROACH THIS WITNESS?

THE FOREPERSON: YOU MAY.

Q. BY MS. NAJERA: SIR, SHOWING YOU WHAT HAS BEEN MARKED PEOPLE'S 1 FOR IDENTIFICATION.

DO YOU RECOGNIZE THAT DOCUMENT?

A. YES, I DO.

Q. CAN YOU TELL US WHAT THAT DOCUMENT IS.

A. THE DOCUMENT IS A TRANSCRIPT OF THE TESTIMONY OF TRACI BAKER.

Q. WERE YOU PRESENT IN COURT WHEN MISS BAKER TESTIFIED?

A. YES, I WAS.

Q. HAVE YOU HAD AN OPPORTUNITY TO LOOK AT THAT TRANSCRIPT?

A. YES, I HAVE.

Q. DOES THAT APPEAR TO BE HER TESTIMONY FROM OCTOBER 12, 1993?

A. IT IS, YES.

Q. NOW, AFTER THE TRIAL OF LYLE AND ERIC MENENDEZ, DID YOU CONTACT A WOMAN NAMED NORMA NOVELLI?

[p. 14] A. YES.

Q. DID YOU RECEIVE ANYTHING FROM MISS NOVELLI?

A. YES, I DID.

Q. CAN YOU TELL US WHAT YOU RECEIVED FROM MISS NOVELLI?

A. I RECEIVED A THREE-PAGE HANDWRITTEN LETTER ADDRESSED TO A MS. M.S. BAKER.

IT APPEARS TO BE - IT'S HANDWRITTEN AND IT APPEARS TO BE INSTRUCTIONS OR DIRECTIONS OF A SCRIPT FOR TESTIMONY.

MS. NAJERA: MADAME FOREMAN, I HAVE WHAT APPEARS TO BE A THREE-PAGE DOCUMENT ADDRESSED TO MISS BAKER.

I WOULD LIKE ALL THREE PAGES MARKED PEOPLE'S 2 FOR IDENTIFICATION.

THE FOREPERSON: SO ORDERED.

(MARKED FOR I.D.: = EXHIBIT 2.)

MS. NAJERA: MAY I APPROACH THE WITNESS?

THE FOREPERSON: YOU MAY, AND YOU MAY CONTINUE TO APPROACH THROUGHOUT THIS HEARING WITHOUT REQUESTING.

MS. NAJERA: THANK YOU.

Q. BY MS. NAJERA: SHOWING YOU WHAT HAS BEEN MARKED PEOPLE'S 2 FOR IDENTIFICATION.

WILL YOU EXAMINE THAT DOCUMENT AND TELL ME IF YOU RECOGNIZE IT.

A. YES, I DO.

Q. CAN YOU TELL THIS GRAND JURY WHAT THAT DOCUMENT IS.

A. IT'S A COPY OF THE THREE-PAGE LETTER THAT I [p. 15] RECEIVED FROM NORMA NOVELLI.

Q. CAN YOU READ THAT DOCUMENT TO THIS GRAND JURY.

A. I WILL TRY.

IT'S HARD TO READ, BUT I'LL TRY

IT'S DATED FEBRUARY 5. THERE IS NO YEAR INDICATED. IT STATES:

(READING:)

"LAW OFFICES.

"MS. BAKER.

"ALL RIGHT, TRACI, THIS IS THE INFORMATION WE DISCUSSED ON THE PHONE ABOUT VISITING ERIC.

"I'M GOING TO GET RIGHT TO THE POINT, BECAUSE AFTER YOU READ THIS AND FEEL YOU HAVE ABSORBED IT, I WANT YOU TO THROW IT AWAY. DO THAT RIGHT AWAY SO YOU DON'T FORGET.

"MAYBE YOU CAN TAKE NOTES IN YOUR OWN HANDWRITING.

"OKAY?"

"WELL, BASICALLY, THERE ARE TWO INCIDENTS. THEY MAY SEEM STRANGE AND IRRELEVANT TO MY CASE, BUT I ASSURE YOU THEY WILL BE VERY HELPFUL. YOU JUST HAVE TO TRUST ME ON IT. LATER I CAN EXPLAIN WHY, BUT, FOR NOW, I WILL JUST LAY THEM OUT.

"I HAVE GIVEN A LOT OF [p. 16] THOUGHT TO THIS AND I REALLY FEEL THAT YOU CAN DO IT. HOWEVER, JUST LET ME KNOW IF YOU WOULD RATHER NOT.

"ALL RIGHT.

"THE FIRST INCIDENT IS AS FOLLOWS:

"YOU WERE AT THE BEVERLY HILLS HOUSE ABOUT TO EAT DINNER WITH ME, MY PARENTS AND MY BROTHER. ED WASN'T THERE.

"WE WILL DECIDE LATER AROUND WHAT DATE THIS INCIDENT OCCURRED. IT WAS A WEEKEND, HOWEVER."

AND THEN IN PARENTHESIS, "(I HATE WRITING IN PEN)."

"YOU AND I HAD SPENT THE DAY TOGETHER. MRS. MENENDEZ HAD COOKED DINNER AND IT WAS SERVED IN THE DINING ROOM. "EVERYONE WAS SEATED EXCEPT MRS. MENENDEZ. SHE WAS STILL BRINGING THIS AND THAT IN FROM THE KITCHEN.

"WE WERE SEATED" - I'M SORRY I JUST CAN'T READ THAT BOTTOM LINE. IT

(READING:)

- "NEXT TO ME WITH [] YOU TO THE" - AND THEN IT STARTS WITH [] PAGE - "SEATED AT THE HEAD OF [] MY LEFT.

[p. 17] "ERIC WAS SEATED ACROSS FROM US, BEHIND MR. MENENDEZ BY THE DOORS THAT OPEN TO THE FOYER.

"ALL THE FOOD WAS ON THE TABLE. THERE WAS LOTS OF IT BUT YOU DIDN'T REMEMBER WHAT THE FOOD WAS.

"ANYWAY, ALL OF A SUDDEN, MR. MENENDEZ SAID IN A STERN VOICE TO MRS. MENENDEZ, WHO WAS STANDING BEHIND YOU, "WHAT DID YOU DO TO THE FOOD?"

"THERE WAS A LONG SILENCE, OR AT LEAST IT SEEMED LONG, AND THEN MR. MENENDEZ SHOVED HIS PLATE FORWARD, KNOCKING OVER SOME STUFF.

"HE GOT UP AND SAID SOMETHING LIKE, 'GO OUT AND WAIT FOR ME BY THE CAR, BOYS. WE ARE GOING OUT TO EAT.'

"THEN I GOT UP IMMEDIATELY AND SAID, "COME ON, TRACI," AND WE BOTH WALKED OUT INTO THE FOYER.

"ERIC WALKED OUT, TOO.

"YOU GOT YOUR PURSE AND JACKET, WE WALKED OUTSIDE AND STOOD IN THE FRONT OF THE BIG MERCEDES.

"ERIC AND I WERE DISCUSSING SOMETHING, WHISPERING. YOU WERE JUST KIND OF STANDING THERE, CONFUSED AND EMBARRASSED.

"THEN MR. MENENDEZ CAME STORMING [p. 18] OUT OF THE HOUSE. HE SEEMED UPSET.

"EITHER ERIC OR I - YOU CAN'T REMEMBER WHICH - SAID TO HIM, 'WHAT'S THE MATTER, DAD? DO YOU THINK SHE TRIED SOMETHING?'

"AS MR. MENENDEZ WAS GETTING INTO THE FRONT SEAT, HE SAID, 'I DON'T KNOW. BUT I DON'T TRUST HER TODAY.'

"WE ALL GOT IN THE CAR, YOU AND I IN THE BACK SEAT, AND WE DROVE IN SILENCE, LISTENING TO SOME RADIO STATION.

"WE MADE A RIGHT COMING OUT OF OUR HOUSE, BUT YOU ARE UNSURE OF THE WAY WE WENT AFTER THAT.

"ANYWAY, WE ENDED UP PARKING SOMEWHERE AND EATING AT HAMBURGER HAMLET. IT WAS A BIG ONE.

"WE ALL ATE DINNER, TALKING ABOUT VARIOUS THINGS.

"MR. MENENDEZ WAS CHARMING. HE PAID THE BILL; WE DROVE BACK HOME.

"YOU AND I STAYED OUT FRONT AND KISSED FOR A LONG TIME. YOU DIDN'T FEEL YOU SHOULD ASK ABOUT WHAT HAD HAPPENED EARLIER.

"YOU THEN LEFT IN YOUR CAR. IT WASN'T THAT LATE. YOU NEVER SAW MRS. MENENDEZ. IT HAD JUST GOTTEN DARK WHEN WE LEFT FOR THE HAMBURGER HAMLET.

[p. 19] "YOU DROVE HOME, STILL CONFUSED ABOUT WHAT HAPPENED IN THE DINING ROOM, ALTHOUGH IT SEEMED OBVIOUS MR. MENENDEZ THOUGHT MRS. MENENDEZ DID SOMETHING TO THE FOOD.

"YOU WERE TRYING TO ASK ME WHAT IT WAS ALL ABOUT, BUT YOU JUST COULDN'T.

"OKAY?

"THAT'S THE FIRST INCIDENT.

"YOU REALLY DON'T NEED TO KNOW ANY MORE DETAILS THAN I'VE" - AND I CAN'T READ THE WORD - "HERE. IT WAS A LONG TIME AGO. IT WOULD BE STRANGE IF YOU REMEMBERED THINGS TOO WELL.

"HOWEVER, YOU DO REMEMBER THE STATEMENTS I MENTIONED ABOVE VERY WELL, WHO SAID WHAT TO WHOM.

"YOU DIDN'T REMEMBER THE UNIMPORTANT CONVERSATIONS, LIKE WHAT WAS SAID AT THE HAMBURGER HAMLET, ET CETERA.

"THE BEST ANSWER TO ANY QUESTION YOU DON'T KNOW THE ANSWER TO IS, 'I DON'T REMEMBER.'

"IT'S OBVIOUS WHY YOU REMEMBER CERTAIN THINGS AND CERTAIN STATEMENTS. IT WAS SCARY AND CONFUSING."

AND THAT'S THE END OF THE THREE-PAGE LETTER.

Q. NOW, DETECTIVE ZOELLER, WHEN YOU WERE PRESENT [p. 20] AT - WHEN SHE TESTIFIED IN COURT ON OCTOBER 12, DID SHE TESTIFY TO AN INCIDENT OF HAVING DINNER AT THE MENENDEZ HOUSE THAT WAS SIMILAR TO WHAT WAS DESCRIBED IN THE LETTER?

A. YES, SHE DID.

Q. DID YOU GO THROUGH THE LETTER AND DETERMINE WHERE HER TESTIMONY CORRESPONDED WITH THE LETTER?

A. YES.

Q. CAN YOU TELL US BRIEFLY WHERE HER TESTIMONY CORRESPONDED WITH THE LETTER.

A. IT CORRESPONDED WITH HER HAVING DINNER WITH THE MENENDEZ FAMILY.

ONLY THE MENENDEZ FAMILY WERE PRESENT, ALONG WITH HERSELF.

IT WAS IN THE DINING ROOM.

SHE TESTIFIED THAT MR. MENENDEZ' BACK WAS TO THE BACK, TO THE DOOR OF THE FOYER.

SHE TESTIFIED THAT MRS. MENENDEZ WAS PUTTING FOOD OUT AND THAT SHE WAS STILL BRINGING FOOD BACK AND FORTH.

SHE TESTIFIED THAT MR. MENENDEZ PUSHED HIS PLATE BACK, KNOCKING OVER ITEMS, AND STOOD UP AND EXCLAIMED, "WHAT DID YOU DO TO THE FOOD?"

SHE TESTIFIED THAT HE TOLD THE BOYS THAT THEY WERE GOING OUT TO DINNER.

SHE TESTIFIED THAT SHE, ALONG WITH ERIC AND LYLE, WENT OUT FRONT BY THE CARS AND WAITED FOR MR. MENENDEZ TO COME OUT.

SHE TESTIFIED WHEN MR. MENENDEZ CAME OUT, SHE [p. 21] AND LYLE WENT INTO THE BACK SEAT OF THE CAR AND ERIC AND MR. MENENDEZ IN THE FRONT.

SHE TESTIFIED THEY WENT TO THE HAMBURGER HAMLET AND THAT THEY HAD A CONVERSATION THERE NOT PERTAINING TO THE INCIDENT THAT OCCURRED AT THE HOUSE.

SHE TESTIFIED THAT MR. MENENDEZ WAS VERY CHARMING.

AND SHE TESTIFIED THAT SHE NEVER ASKED ABOUT THE INCIDENT AT THE HOUSE.

Q. WERE YOU PRESENT AT THE END OF THE TRIAL?

A. YES, I WAS.

Q. AT THE END OF THE TRIAL, DID THE DEFENSE COMMENT ON MISS BAKER'S TESTIMONY?

A. YES, THEY DID.

Q. AND DID THEY ARGUE ANYTHING WITH RESPECT TO MISS BAKER'S TESTIMONY AND WHY IT WAS IMPORTANT?

A. YES.

Q. AND WHAT WAS THAT?

A. THE CLOSING ARGUMENT - AS FAR AS THIS PORTION IS CONCERNED, THE CLOSING ARGUMENT STATED THAT THIS INCIDENT SHOWS THE STATE OF MIND OF THE BROTHERS AND WHY THE BROTHERS WERE IN FEAR OF, IN THIS INSTANCE, THE MOTHER.

MS. NAJERA: THANK YOU, SIR.

THE FOREPERSON: IF ANY MEMBERS OF THE GRAND JURY HAVE ANY QUESTIONS, PLEASE WRITE THEM ON A PIECE OF PAPER.

THEY WILL BE PICKED UP BY THE SERGEANT-AT-ARMS.

[p. 22] (SHORT PAUSE.)

Q. BY MS. NAJERA: DETECTIVE ZOELLER, WERE YOU EVER INFORMED OF WHAT FOOD WAS COOKED FOR THAT DINNER BY MRS. MENENDEZ?

A. NO.

Q. CAN YOU TELL US HOW YOU CAME TO LOCATE THIS LETTER.

A. THE LETTER CAME TO MY ATTENTION THROUGH DEPUTY DISTRICT ATTORNEY PAMELA BOZANICH.

SHE HAD BEEN TALKING TO A WRITER BY THE NAME OF DOMINIC DUNN, AND HE WAS TALKING TO HER ABOUT NORMA NOVELLI AND HER CONNECTION TO LYLE.

LYLE WAS USING HER TELEPHONE AS FAR AS A THREE-WAY - USING THE TELEPHONE FOR THREE-WAY CONFERENCE CALLS.

AND, IN THE SAME CONVERSATION, DOMINIC DUNN HAD GIVEN HER, PAMELA BOZANICH, A COPY OF TWO OF THE PAGES THAT I HAVE THREE OF.

AND, WITH THAT INFORMATION, I WENT TO INTERVIEW NORMA NOVELLI AND OBTAINED ALL THREE PAGES.

Q. AND DO YOU KNOW HOW MISS NOVELLI GOT THE LETTER?

A. JUST BY WHAT SHE TOLD ME.

SHE SAID IT CAME IN AN UNMARKED ENVELOPE ABOUT 4 MONTHS PRIOR TO MY INTERVIEW, WHICH WAS APPROXIMATELY A MONTH AGO, WITH NORMA.

AND IT CAME IN THE MAIL, AS I SAID, AND IT WAS [p. 23] UNSIGNED AND IN AN UNMARKED ENVELOPE TO HER.

Q. AND WAS IT YOUR UNDERSTANDING THAT MISS NOVELLI RECEIVED CORRESPONDENCE FROM MR. LYLE MENENDEZ?

A. YES.

Q. DO YOU KNOW WHERE THE ORIGINAL OF THAT COPY IS?

A. I DO NOT, NO.

Q. DID YOU EVER LEARN WHAT THE SECOND INCIDENT MENTIONED IN THE LETTER WAS?

A. NO, I DID NOT.

Q. DOES THE LETTER APPEAR TO BE COMPLETE OR NOT?

A. IT APPEARS TO BE INCOMPLETE.

MS. NAJERA: THANK YOU, SIR.

THE FOREPERSON: ARE THERE ANY ADDITIONAL QUESTIONS FROM THE GRAND JURORS?

(SHORT PAUSE.)

THE FOREPERSON: THERE BEING NO FURTHER QUESTIONS, DETECTIVE ZOELLER, BEFORE YOU LEAVE, PLEASE LISTEN VERY CAREFULLY TO WHAT I'M GOING TO SAY TO YOU NOW:

YOU ARE ADMONISHED NOT TO REVEAL TO ANY OTHER PERSON, EXCEPT AS ORDERED BY THE COURT, WHAT QUESTIONS WERE ASKED OF YOU AND WHAT RESPONSES WERE GIVEN.

IN ADDITION, YOU ARE NOT TO REVEAL ANY OTHER MATTERS CONCERNING THE NATURE OR SUBJECT OF THE INVESTIGATION WHICH YOU LEARNED DURING YOUR APPEARANCE HERE, UNLESS AND UNTIL SUCH TIME AS A TRANSCRIPT OF THESE PROCEEDINGS IS MADE PUBLIC.

[p. 24] I WISH TO ADVISE YOU ALSO THAT A VIOLATION OF THIS ORDER CAN BE THE BASIS OF A CONTEMPT CHARGE AGAINST YOU.

DO YOU UNDERSTAND?

THE WITNESS: YES, I DO.

THE FOREPERSON: THANK YOU.

YOU ARE EXCUSED.

(THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

MS. NAJERA: MADAME FOREMAN, AT THIS TIME WE WOULD LIKE TO CALL TRACI BAKER.

THE FOREPERSON: TRACI BAKER?

THE WITNESS: YES.

THE FOREPERSON: PLEASE RAISE YOUR RIGHT HAND.

DO YOU SOLEMNLY SWEAR THAT THE EVIDENCE YOU SHALL GIVE IN THIS MATTER NOW PENDING BEFORE THE GRAND JURY OF THE COUNTS TEA OF LOS ANGELES, SHALL BE THE TRUTH, THE WHOLE TRUTH AND NOTHING BUT THE TRUTH, SO HELP YOU GOD?

THE WITNESS: YES, MA'AM.

THE FOREPERSON: PLEASE BE SEATED.

MISS BAKER, PLEASE STATE AND SPELL YOUR FULL NAME, SPEAKING DIRECTLY INTO THE MICROPHONE. THE WITNESS: FIRST NAME FIRST?

OKAY.

TRACI, T-R-A-C-I, LE, L-E, BAKER, B-A-K-E-R.

THE FOREPERSON: YOU MAY PROCEED.

[p. 25] MS. NAJERA: THANK YOU.

TRACI LE BAKER, CALLED AS A WITNESS
BEFORE THE LOS ANGELES COUNTY GRAND JURY,
WAS DULY SWORN AND TESTIFIED AS FOLLOWS:

EXAMINATION

BY MS. NAJERA:

Q. MISS BAKER, ARE YOU ACQUAINTED WITH
THE DEFENDANT LYLE MENENDEZ?

A. AT THIS TIME, I WASN'T ABLE TO SPEAK
WITH MY ATTORNEY. HE'S STILL WITH THE SPECIAL
MASTER.

MAY I ASK PERMISSION TO GO AND CONFER
WITH HIM FOR A MOMENT?

THE FOREPERSON: IF THE SERGEANT-AT-
ARMS WOULD PLEASE ESCORT MISS BAKER TO THE
DOOR SO SHE MAY SPEAK WITH HER ATTORNEY.

(THE WITNESS EXITS THE GRAND
JURY HEARING ROOM.)

THE SERGEANT-AT-ARMS: MADAME FORE-
MAN, IT IS GOING TO BE A FEW MINUTES.

THE FOREPERSON: THANK YOU.

MS. NAJERA: MADAME FOREMAN, MAY WE
HAVE PERMISSION TO LEAVE THE GRAND JURY
ROOM FOR A MOMENT?

THE FOREPERSON: YES, YOU MAY.

[p. 26] (THE DEPUTIES DISTRICT ATTORNEY EXIT
THE GRAND JURY HEARING ROOM.)

(SHORT PAUSE.)

THE FOREPERSON: BACK ON THE RECORD.

MS. NAJERA: WE WOULD RECALL TRACI
BAKER.

THE FOREPERSON: THANK YOU.

THE FOREPERSON: MISS BAKER, YOU WILL
RECALL THAT HAVE PREVIOUSLY BEEN SWORN
AND ARE STILL UNDER OATH.

THE WITNESS: YES.

THE FOREPERSON: YOU MAY PROCEED.

MS. NAJERA: THANK YOU.

Q. MISS BAKER, ARE YOU ACQUAINTED WITH
THE DEFENDANT LYLE MENENDEZ?

A. BASED ON THE ADVICE OF MY COUNSEL, I
RESPECTFULLY DECLINE TO ANSWER THE QUES-
TION BECAUSE MY ANSWER MIGHT TEND TO
INCRIMINATE ME.

Q. DID YOU KNOW HIM ON AUGUST - DURING
AUGUST OF 1989?

A. AGAIN, I HAVE TO GO CONFER WITH COUN-
SEL.

I APOLOGIZE IF IT'S INCONVENIENT, BUT THIS
IS WHAT I HAVE BEEN INSTRUCTED TO DO.

MAY I DO THIS?

THE FOREPERSON: THE SERGEANT-AT-ARMS WILL ESCORT MISS BAKER TO THE DOOR TO COMPLY WITH HER REQUEST TO SPEAK WITH HER COUNSEL.

[p. 27] (THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

(SHORT PAUSE.)

THE FOREPERSON: MISS BAKER, LET ME REMIND YOU THAT YOU ARE STILL UNDER OATH.

THE WITNESS: THANK YOU.

Q. BY MS. NAJERA: AND THE QUESTION I ASKED YOU WAS:

DID YOU KNOW HIM IN AUGUST OF 1989?

A. AGAIN, BASED ON THE ADVICE OF COUNSEL, I RESPECTFULLY DECLINE TO ANSWER THE QUESTION BECAUSE MY ANSWER MIGHT TEND TO INCRIMINATE ME.

Q. WHEN YOU WERE SERVED WITH A SUBPOENA FOR THIS GRAND JURY PROCEEDING, IT WAS ALSO ORDERED THAT YOU BRING WITH YOU SOME DOCUMENTS RELATING TO YOUR CORRESPONDENCE WITH LYLE MENENDEZ.

DID YOU BRING THESE DOCUMENTS?

A. I'M GOING TO HAVE TO AGAIN CONFER.
I'M SORRY.

MR. CONN: BEFORE THE WITNESS GETS UP, MADAME FOREMAN, I THINK AT THIS POINT WE MAY NEED THE PRESIDING JUDGE TO DETERMINE WHETHER OR NOT THE ANSWER MAY TEND TO INCRIMINATE THE WITNESS.

I THINK THIS IS A QUESTION THAT WILL CLEARLY NOT INCRIMINATE.

SHE IS UNDER GRAND JURY SUBPOENA TO PRODUCE THE [p. 28] DOCUMENTS.

SHE'S FAILED TO PRODUCE THE DOCUMENTS, AND WE WILL ASK THAT SHE BE HELD IN CONTEMPT OF THIS COURT BY THE PRESIDING JUDGE.

MR. WHITE: MADAME FOREMAN, MAY WE TO A A 10-MINUTE RECESS, ORDER THE WITNESS BACK IN 10 MINUTES, SO I CAN CONFER WITH THE PRESIDING JUDGE?

THE FOREPERSON: MISS BAKER, YOU ARE EXCUSED AND ORDERED TO RETURN IN 10 MINUTES TO THIS HEARING ROOM WITHOUT FURTHER SUBPOENA, REMINDER OR ORDER.

DO YOU UNDERSTAND?

THE WITNESS: YES.

YOU ARE ADMONISHED NOT TO REVEAL TO ANY OTHER PERSON, EXCEPT AS ORDERED BY THE COURT, WHAT QUESTIONS WERE ASKED OF YOU AND WHAT RESPONSES WERE GIVEN.

IN ADDITION, YOU ARE NOT TO REVEAL ANY OTHER MATTERS CONCERNING THE NATURE OR

SUBJECT OF THE INVESTIGATION-WHICH YOU LEARNED DURING YOUR APPEARANCE HERE, UNLESS AND UNTIL SUCH TIME AS A TRANSCRIPT OF THESE PROCEEDINGS IS MADE PUBLIC.

I WISH TO ADVISE YOU ALSO THAT A VIOLATION OF THIS ORDER CAN BE THE BASIS OF A CONTEMPT CHARGE AGAINST YOU.

DO YOU UNDERSTAND?

THE WITNESS: YES.

THE FOREPERSON: THANK YOU.

YOU ARE EXCUSED.

THE WITNESS: OKAY.

[p. 29] (THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

THE FOREPERSON: WE ARE IN RECESS FOR 10 MINUTES.

THE GRAND JURORS ARE ADMONISHED THAT THEY ARE NOT TO FORM OR EXPRESS ANY OPINIONS ABOUT THIS CASE OR DISCUSS IT AMONG THEMSELVES UNTIL THE MATTER COMES BEFORE US FOR DELIBERATION.

WE ARE IN RECESS FOR 10 MINUTES.

(SHORT RECESS TAKEN.)

* * *

[p. 31] THIS GRAND JURY.

THE SHERIFF IS ORDERED TO TRANSPORT YOU FORTHWITH TO DEPARTMENT 110 OF THE SUPERIOR COURT FOR FURTHER PROCEEDINGS REGARDING THIS CONTEMPT.

I FURTHER DIRECT THE GRAND JURY LEGAL ADVISOR, DEPUTIES DISTRICT ATTORNEY AND THE COURT REPORTER TO PROCEED IMMEDIATELY TO DEPARTMENT 110 FOR FURTHER PROCEEDINGS IN THIS MATTER.

(THE WITNESS EXITS THE GRAND JURY HEARING ROOM.)

THE FOREPERSON: THE GRAND JURY IS NOW IN RECESS IN THIS MATTER.

DO WE NEED TO BE ADMONISHED IN THIS?

MR. WHITE: LET'S GO BACK ON THE RECORD SO SHE CAN DO SOMETHING.

THE FOREPERSON: WE ARE BACK ON THE RECORD OUT OF THE PRESENCE OF THE WITNESS.

MS. NAJERA: THE ONLY TWO DOCUMENTS THAT WE HAVE MARKED FOR PURPOSE OF THIS HEARING, EXHIBITS 1 AND 2, WE WOULD ASK THAT THEY BE PUT IN EVIDENCE RIGHT NOW.

THE FOREPERSON: SO ORDERED.

(RECEIVED IN EVID.: = EXHIBITS 1 & 2.)

THE FOREPERSON: THE GRAND JURORS HAVE BEEN ADMONISHED REGARDING DISCUSSION OF THE CASE.

PLEASE REMEMBER AND FOLLOW THE ADMONITION.

THE GRAND JURY IS NOW IN RECESS IN THIS [p. 32] MATTER.

(RECESS TAKEN.)

[p. 33] LOS ANGELES, CALIFORNIA; MONDAY,
MARCH 21, 1994

DEPARTMENT NO. 110 HON. FLORENCE MARIE
COOPER, JUDGE

11:40 A.M.

THE COURT: WE ARE ON THE RECORD IN CHAMBERS.

I AM SUBSTITUTING FOR DEPARTMENT 100 ON THE MOTION TO QUASH A GRAND JURY SUBPOENA IN GRAND JURY PROCEEDINGS.

TRACI BAKER IS THE PERSON UNDER INVESTIGATION IN THIS PROPOSED INDICTMENT.

IS THAT CORRECT, MR. WHITE?

MR. WHITE: YES.

IT IS NOT AN INDICTMENT. IT IS JUST AN INVESTIGATORY HEARING. SO THEY WEREN'T SEEKING AN INDICTMENT.

THE COURT: BECAUSE THAT'S PART OF WHAT I NEED TO UNDERSTAND BEFORE I CAN DO MUCH OF ANYTHING WITH THIS.

TELL ME THE DIFFERENCE BETWEEN A PLAIN INVESTIGATORY PROCEEDING AND SOMETHING THAT'S HEADING TOWARD INDICTMENT.

WHAT IS THIS?

MR. WHITE: THE MAIN DIFFERENCE IS JUST AS IT'S STATED.

THE DISTRICT ATTORNEY WILL COME IN AND THEY ARE ONLY INVESTIGATING A POSSIBLE CRIMINAL ACTION, BUT THEY WON'T BE REQUESTING AN INDICTMENT HEARING AT THAT TIME.

IT COULD LATER TURN INTO AN INDICTMENT OR IT COULD JUST BE A PROCEDURE FOR THE DISTRICT ATTORNEY'S [p. 34] OFFICE TO GAIN INFORMATION.

IN THIS PROCEEDING, THEY WERE NOT REQUESTING AN INDICTMENT AT THIS TIME.

THE COURT: BUT IF SOMEONE IS GOING TO BE INDICTED AS A RESULT OF THIS INVESTIGATION, IT'S PROBABLY TRACI BAKER?

MR. WHITE: YES.

THE ALLEGATIONS ARE POSSIBLE PERJURY REGARDING HER TESTIMONY IN THE MENENDEZ TRIAL.

THE COURT: JUST THROUGH THE MEDIA, I THINK I UNDERSTAND WHY THIS INVESTIGATION IS ON GOING.

THERE HAS BEEN AN INDICATION THAT A LETTER WAS WRITTEN BY ERIC OR LYLE -

MR. WHITE: I BELIEVE IT WAS WRITTEN BY LYLE.

THE COURT: - LYLE TO THIS WITNESS INSTRUCTING HER HOW TO TESTIFY.

AND OBVIOUSLY THESE PROCEEDINGS INVOLVE A GRAND JURY SUBPOENA TO MISS BAKER TO PRODUCE ANY CORRESPONDENCE FROM LYLE MENENDEZ.

MR. WHITE: THAT'S CORRECT.

MY CONCERN, CERTAINLY, IS EXPRESSED BY HER ATTORNEY THAT THE PRODUCTION OF ANY SUCH CORRESPONDENCE COULD TEND TO INCRIMINATE HER.

AND IF, IN FACT, SHE'S THE FOCUS OF THIS INVESTIGATION, THERE WOULD APPEAR TO BE SOME MERIT TO THAT.

THE COURT: I WOULD IMAGINE WHAT WE NEED TO DO IS TO PROCEED WITH A CLOSED HEARING IN THIS COURTROOM.

IS MISS BAKER THERE ALONG WITH HER ATTORNEY?

[p. 35] MR. WHITE: MISS BAKER IS HERE.

HER ATTORNEY IS OUTSIDE, BUT HE IS PREPARED TO COME IN IF SHE REQUESTS HIS APPEARANCE, WHICH I BELIEVE SHE WILL.

THE COURT: I BELIEVE THAT'S PRETTY PREDICTABLE.

I THINK THAT'S WHAT WE ARE GOING TO HAVE TO DO, THEN, WE CAN DO IT IN THE COURTROOM. BECAUSE I CAN SIMPLY LOCK THE COURT.

IT'S ALMOST 12:00 O'CLOCK.

MS. NAJERA: IT'S CONVENIENT FOR EVERYBODY TO DO THIS NOW -

THE COURT: I THINK EVERYONE IS HERE.

WHY DON'T WE JUST DO THIS NOW, THEN, AND INSTRUCT RENEE TO LOCK THE COURTROOM.

AND YOU CAN ASK MISS BAKER IF SHE WANTS HER ATTORNEY IN SO WE DON'T LOCK HIM OUT IN THE HALL.

(SHORT PAUSE.)

THE COURT: WE ARE ON THE RECORD TO HEAR PROCEEDINGS IN CONNECTION WITH A MOTION TO QUASH A GRAND JURY SUBPOENA.

FOR THE RECORD, ALTHOUGH WE ARE IN THE COURTROOM, WE ARE NOT IN OPEN COURT IN THAT THE COURT HAS BEEN LOCKED.

IS THAT CORRECT?

THE CLERK: THAT IS CORRECT, YOUR HONOR.

THE COURT: THE PERSONS PRESENT PLEASE STATE YOUR [p. 36] NAMES FOR THE RECORD.

MR. WHITE: TERRY WHITE, DEPUTY DISTRICT ATTORNEY AND ALSO LEGAL ADVISOR FOR THE L.A. COUNTY GRAND JURY.

MR. CONN: DAVID CONN, DEPUTY DISTRICT ATTORNEY.

MR. GABBERT: PAUL GABBERT, G-A-B-B-E-R-T, COUNSEL FOR THE WITNESS TRACI BAKER.

THE COURT: AND MISS BAKER HAS REQUESTED THAT YOU BE PRESENT IN THIS PROCEEDING.

IS THAT CORRECT?

MR. GABBERT: THAT'S CORRECT.

THE COURT: MISS BAKER IS PRESENT AND ONE MORE PERSON PRESENT, GRAND JURY INVESTIGATOR DENNIS DUARTE.

MS. NAJERA: MAY MISS BAKER SIT AT COUNSEL TABLE?

THE COURT: SHE MAY.

ALL RIGHT.

I HAVE BEEN PROVIDED WITH A COPY OF A MOTION TO QUASH A GRAND JURY SUBPOENA AND FEDERAL AUTHORITIES IN SUPPORT OF THAT MOTION.

NEEDLESS TO SAY, I HAVEN'T READ THOSE.

LET ME ASK A COUPLE OF PRELIMINARY QUESTIONS TO SEE IF I UNDERSTAND EXACTLY WHAT THE ISSUE IS.

HAS MISS BAKER BEEN SUBPOENAED TO BOTH TESTIFY AND PRODUCE DOCUMENTS?

MR. CONN: THAT'S CORRECT.

THE COURT: HAS ANY TESTIMONY BEEN TAKEN?

MR. CONN: YOUR HONOR, THE WITNESS TOOK THE STAND THIS MORNING BEFORE THE GRAND JURY, WE ASKED A COUPLE OF QUESTIONS OF HER AND SHE INVOKED HER FIFTH AMENDMENT [p. 37] PRIVILEGE TO BOTH OF THOSE QUESTIONS.

WE WERE THEN BEGINNING THE PROCESS OF ASKING HER WHETHER SHE HAD PRODUCED THE DOCUMENTS THAT SHE WAS SUBPOENAED TO PRODUCE BEFORE THE GRAND JURY; AND, ONCE AGAIN, SHE WAS INVOKING HER FIFTH AMENDMENT PRIVILEGE AS TO THAT.

SO WE WERE NOT ABLE TO ELICIT FROM HER THE FACT THAT SHE HAS FAILED TO PRODUCE DOCUMENTS.

THE COURT: ALL RIGHT.

ALTHOUGH THERE HAS BEEN A REQUEST TO TESTIFY AND AN INVOCATION OF THE FIFTH AMENDMENT, I DON'T THINK THAT ISSUE IS BEFORE THE COURT.

IT SEEMS TO ME THAT ALL IS AT ISSUE HERE IS THE DEFENDANT'S MOTION TO QUASH THE SUBPOENA WITH RESPECT TO DOCUMENTS AND AS TO WHETHER THERE IS A FIFTH AMENDMENT PRIVILEGE CONCERNING TESTIMONY.

THAT'S DOWN THE LINE, I GUESS, IN LATER LITIGATION.

MISS BAKER HAS BEEN ASKED TO PRODUCE LETTERS OR ANY CORRESPONDENCE THAT SHE HAS RECEIVED FROM LYLE MENENDEZ.

THE MOTION FILED BY THE DEFENSE CONTENTS THAT THE PRODUCTION OF THOSE DOCUMENTS, EVEN IF THE DOCUMENTS WERE NOT WRITTEN BY HER, ARGUABLY, MIGHT NOT BE INCRIMINATING.

THE CONTENTION OF THE DEFENSE IS THAT THE PRODUCTION OF THE DOCUMENTS IS AN INCRIMINATING ACT IN ITSELF AND IT'S PROTECTED BY THE FIFTH AMENDMENT AND THE [p. 38] DEFENDANT WOULD BE ENTITLED TO IMMUNITY BEFORE SHE WOULD BE REQUIRED TO PRODUCE THEM.

SO PERHAPS I SHOULD HEAR FROM THE PEOPLE IN RESPONSE TO THIS.

MR. CONN: THE AUTHORITY THAT WE WERE ABLE TO REFER TO AT THIS POINT IN TIME WAS UNITED STATES VS. DOE, UNITED STATES SUPREME COURT, 1984 CASE AT 104 SUPERIOR COURT 1237.

IT'S MY UNDERSTANDING FROM UNITED STATES VS. DOE THAT THE PRODUCTION OF RECORDS ITSELF IS REQUIRED.

IN THIS CASE INVOLVING A FEDERAL STATUTE CONCERNING USE IMMUNITY, THE SUPREME COURT HELD THAT THE WITNESS MAY RECEIVE USE

IMMUNITY AS TO THOSE DOCUMENTS THEMSELVES, BUT THE CONTENTS OF THE DOCUMENTS WERE NEVERTHELESS ADMISSIBLE AND WERE NOT PRIVILEGED AND HAD TO BE PRODUCED.

SO I THINK THAT THE FIRST ISSUE THAT MAY ARISE IS THE DIFFERENCE BETWEEN THE FEDERAL AUTHORITIES DEALING WITH A FEDERAL USE IMMUNITY STATUTE AND CALIFORNIA, WHICH DOES NOT HAVE A SIMILAR STATUTE.

WERE THIS TO BE ARGUED IN FEDERAL COURT, THE PRACTICAL EFFECT OF THIS, I BELIEVE, WOULD BE THAT THE WITNESS WOULD BE REQUIRED TO PRODUCE THE DOCUMENTS, BUT THAT THOSE DOCUMENTS WOULD NOT BE SOMETHING THAT WE COULD USE AGAINST THIS PARTICULAR WITNESS.

SO SHE WOULD NOT HAVE IMMUNITY FOR THE ENTIRE CRIME, BUT THOSE DOCUMENTS COULD NOT BE USED AGAINST HER IN A CRIMINAL PROCEEDING.

[p. 39] WE THEN TURN TO THE STATE LAW, WHERE WE HAVE NO SUCH USE IMMUNITY BY STATUTE AND WE NEED TO DETERMINE THE DISTINCTION TO BE DRAWN THERE.

MY OPINION, YOUR HONOR, IS, AT MOST, WE WOULD BE GUIDED BY THE SAME STANDARD; THAT IS, AT THE VERY MOST, WE COULD NOT USE THOSE DOCUMENTS AGAINST THIS WITNESS IN A CRIMINAL PROCEEDING.

THE QUESTION IS WHETHER THAT STANDARD EVEN APPLIES UNDER THE STATE LAW.

BUT MY POSITION IS THAT, AT LEAST AT THIS POINT, THE WITNESS SHOULD BE ORDERED TO PRODUCE THE DOCUMENTS.

THERE IS A VALID SUBPOENA ORDERING HER TO PRODUCE THE DOCUMENTS, AND THE QUESTION OF WHAT USE CAN BE MADE OF THOSE DOCUMENTS IN THE FUTURE IS SOMETHING THAT THIS COURT OR SOME OTHER COURT CAN DETERMINE AT SUCH TIME THAT THE PEOPLE SEEK TO USE THOSE DOCUMENTS IN AN ACTION AGAINST HER.

THE COURT: I DON'T THINK THAT'S GOING TO PROVIDE MUCH COMFORT TO THE DEFENSE.

LET ME ASK YOU THIS:

ASSUMING THAT IN CALIFORNIA, WHERE WE HAVE TRANSACTIONAL IMMUNITY, ASSUMING THAT THAT APPLIED TO THIS CASE - AND I'M NOT SURE WHETHER THAT WOULD CREATE A DISTINCTION THAT MAKES MUCH DIFFERENCE IN THIS CASE IN TERMS OF THE EFFECT IT WOULD HAVE - ARE THE PEOPLE WILLING TO GRANT THIS WITNESS TRANSACTIONAL IMMUNITY IN EXCHANGE FOR THE PRODUCTION OF THE DOCUMENTS?

[p. 40] MR. CONN: NO, YOUR HONOR, WE ARE NOT.

IN FACT, THERE IS ANOTHER MATTER WHICH IS CLOSELY RELATED TO THE ONE WE ARE DISCUSSING.

IN FACT, IT'S SOMEWHAT INEXTRICABLE FROM THE MATTER WE ARE DISCUSSING, WHICH I SHOULD BRING TO THE COURT'S ATTENTION

ALTHOUGH, SPECIFICALLY, I DON'T THINK THE MATTER IS PROBABLY REALLY BEFORE THE COURT.

AND THAT IS THIS:

AFTER I HAD AN OPPORTUNITY TO REVIEW THE AUTHORITIES THIS WEEKEND CONCERNING THIS MATTER - WELL, I SHOULD POINT OUT ON FRIDAY, YOUR HONOR, WE OBTAINED A SEARCH WARRANT TO SEARCH THE WITNESS' HOME.

THE DOCUMENTS THAT WE ARE SEEKING ARE NOT THE DOCUMENTS THAT ARE NORMALLY SUBJECT ONLY TO A GRAND JURY SUBPOENA, SUCH AS THE DOCUMENTS THAT WERE INVOLVED IN UNITED STATES VS. DOE.

WE ARE SEEKING DOCUMENTS WHICH ARE CLEARLY INCRIMINATING OR EVIDENCE OF A CRIME. AND, AS SUCH, THEY ARE SUBJECT TO A SEARCH WARRANT AS WELL AS A GRAND JURY SUBPOENA.

SO LAST FRIDAY WE OBTAINED A SEARCH WARRANT FROM JUDGE POUNDERS AND WE WENT TO THE HOME OF THE WITNESS AND WE SEARCHED HER HOME.

WE DID NOT FIND THE DOCUMENTS.

SHE DID INDICATE DURING THE SEARCH THAT THE DOCUMENTS WERE TURNED OVER TO HER ATTORNEY, MR. GABBERT.

SHE WAS, OF COURSE, STILL ORDERED TO APPEAR BEFORE THE GRAND JURY TODAY AND PRODUCE THOSE DOCUMENTS.

[p. 41] WHAT WE DECIDED TO DO, SINCE THESE WERE DOCUMENTS THAT WERE SUBJECT TO A SEARCH WARRANT, WE DECIDED TO SEEK ANOTHER SEARCH WARRANT TO RECOVER THE DOCUMENTS FROM COUNSEL.

IT IS OUR POSITION THAT THE MERE FACT THAT SHE HAS TURNED THE DOCUMENTS OVER TO HER COUNSEL DOES NOT CHANGE THE NATURE OF THE DOCUMENTS.

THEY WERE EVIDENCE OF A CRIME BEFORE AND THEY ARE EVIDENCE OF A CRIME NOW.

JUDGE POUNDERS AGREED. AND THIS MORNING JUDGE POUNDERS ISSUED A SEARCH WARRANT FOR THE DOCUMENTS.

NOW, THE ORIGINAL DRAFT OF THE SEARCH WARRANT THAT I HAD DRAFTED THIS MORNING IDENTIFIED THREE LOCATIONS TO BE SEARCHED.

ONE WAS THE LAW OFFICE OF MR. GABBERT, THE SECOND LOCATION WAS HIS PERSON AND BRIEFCASE AND THE THIRD WAS THE PERSON OF TRACI BAKER.

AS THAT WAS BEING PREPARED FOR JUDGE POUNDERS' SIGNATURE, I SAW MR. GABBERT IN THE HALLWAY AND I INQUIRED OF HIM WHETHER HE HAD BROUGHT THE DOCUMENTS WITH HIM.

HE INDICATED TO ME THAT HE HAD, IN FACT, BROUGHT THE DOCUMENTS WITH HIM.

THAT BEING THE CASE, I DECIDED NOT TO MAKE THE SEARCH WARRANTS ANY BROADER

THAN NECESSARY, SO I AMENDED THE WARRANTS TO INCLUDE ONLY THE PERSON OF MR. GABBERT AND THE PERSON OF TRACI BAKER.

THAT IS, IN FACT, THE SEARCH WARRANT THAT WE PRESENTED TO JUDGE POUNDERS; AND, ONCE AGAIN, HE SIGNED [p. 42] THAT SEARCH WARRANT TODAY.

FOLLOWING THE ISSUANCE OF THAT SEARCH WARRANT, WE BROUGHT A SPECIAL MASTER AND REQUIRED MR. GABBERT TO OPEN HIS BRIEFCASE AND REVEAL THE CONTENTS OF HIS BRIEFCASE FIRST TO THE SPECIAL MASTER AND THEN TO THE INVESTIGATING OFFICER, WHICH HE DID.

AFTER IT WAS SHOWN AND THE DOCUMENTS WERE STILL NOT PRODUCED, I INQUIRED OF COUNSEL, WAS IT NOT THE CASE THAT HE HAD TOLD ME THIS VERY MORNING THAT HE HAD THE DOCUMENTS THAT WE WERE SEEKING ON HIS PERSON.

HE SUGGESTED THAT IT WAS A MISUNDERSTANDING ON MY PART; THAT HE NEVER CLAIMED THAT THE DOCUMENTS WERE ON HIS PERSON.

AT THIS POINT, WHAT WE DID WAS WE ONCE AGAIN REWROTE THE SEARCH WARRANT, BROUGHT IT TO JUDGE POUNDERS AND IT'S MY UNDERSTANDING THAT JUDGE POUNDERS HAS NOW SIGNED THAT SEARCH WARRANT.

SO THE DOCUMENTS WE ARE SEEKING IS PROPERLY SUBJECT TO SEIZURE PURSUANT TO A SEARCH WARRANT, AND WE INTEND AT THIS TIME TO GO

OUT TO COUNSEL'S OFFICE AND SEE THE DOCUMENTS AT HIS OFFICE.

AS I SAID, PROPERLY SPEAKING, THAT IS NOT THE ISSUE BEFORE THE COURT.

THE ISSUE BEFORE THE COURT IS THE CONTEMPT, AND I WOULD ASK THAT THE COURT EITHER FIND HER IN CONTEMPT AT THIS TIME OR THE COURT CAN HOLD THAT RULING IN ABEYANCE UNTIL WE HAVE HAD AN OPPORTUNITY TO GO TO COUNSEL'S OFFICE AND GET THE DOCUMENTS.

[p. 43] AND ONCE WE HAVE THOSE DOCUMENTS IN OUR POSSESSION, WE HAVE NO INTEREST IN HOLDING THIS WITNESS IN CONTEMPT ANY LONGER.

THE COURT: ALL RIGHT.

MR. GABBERT?

MS. NAJERA: SOME, PERHAPS MOST, OF WHAT COUNSEL HAS SAID APPEARS TO BE ACCURATE, ALTHOUGH I DON'T THINK THE DOE CASE IS CONTROLLING.

MOVING BACK A DAY, TO GIVE THE COURT THE PROSPECTIVE OF WHY WE ARE HERE AND WHY WE ARE PURSUING SIMULTANEOUSLY TWO LEGAL AVENUES WHICH MAY OR MAY NOT BE AN ABUSE OF THE GRAND JURY PROCESS:

I MADE ARRANGEMENTS WITH COUNSEL TO HAVE MISS BAKER SERVED IN MY OFFICE ON THE AFTERNOON OF LAST THURSDAY SO SHE COULD

RECEIVE THE SUBPOENA TO ATTEND THE GRAND JURY ON MONDAY.

MR. ZOELLER GOT THERE IN THE AFTERNOON AND SERVED HER.

WHEN I LOOKED AT THE SUBPOENA, THE SUBPOENA ASKED HER TO PRODUCE DOCUMENTS - AND I'M PARAPHRASING; I'M NOT READING OFF THE DOCUMENT RIGHT NOW - THAT SAID, "ALL CORRESPONDENCE OR ANY CORRESPONDENCE FROM LYLE MENENDEZ."

ALTHOUGH I ONLY KNOW THIS FROM WHAT I HAVE READ IN THE PAPER, SORT OF, IT APPEARS THAT THERE WAS A LETTER THAT SOMEONE GOT TO DOMINIC DUNN THAT PURPORTS TO BE FROM LYLE MENENDEZ AND IS WRITTEN TO A TRACI.

AND IT DISCUSSES - APPEARS TO DISCUSS PORTIONS OF HER TESTIMONY AT THE PREVIOUS TRIAL.

[p. 44] I WAS PROVIDED WITH A COPY, A POOR PHOTOSTAT OF THAT COPY OF THAT DOCUMENT BY A SOURCE OTHER THAN MY CLIENT, WHICH I PROVIDED TO THE SPECIAL MASTER AND COUNSEL WHEN THE WARRANT WAS EXECUTED TODAY.

WHEN I GOT THE SUBPOENA, I DID SOME RESEARCH.

I CALLED MR. CONN ON THE FOLLOWING MORNING AND I SAID, "I BELIEVE THE ACT OF PRODUCTION IS TESTIMONIAL AND COMPELLED AND PROTECTED BY THE FIFTH AMENDMENT, AND I'M GOING TO BRING A MOTION TO QUASH THE SUBPOENA AS TO THAT PORTION."

AND I SAID, "SHALL WE CONTINUE THE HEARING SO THERE WILL BE TIME FOR THIS?"

AND HE SAID, "NO."

I CALLED HIM BACK AND SAID, "WELL, TO GET THIS HEARD BEFORE MONDAY" - BECAUSE IT WAS NOW FRIDAY - "I NEED AN APPLICATION FOR AN ORDER SHORTENING TIME THAT I WILL BRING INTO DEPARTMENT 100.

"I ASSUME YOU WILL OPPOSE IT," OR ASKED HIM IF HE OPPOSED IT.

AND HE SAID HE OPPOSED IT.

I HAD THE DOCUMENTS PREPARED, WHICH ARE NOW BEFORE YOU AND I SENT THEM DOWN TO DEPARTMENT 100 THAT AFTERNOON. AND, UNBEKNOWNST TO ME, THEY WERE GETTING A SEARCH WARRANT, APPARENTLY.

THERE WAS NOBODY IN DEPARTMENT 100; THEY WOULDN'T FILE THE DOCUMENTS.

I DID A LITTLE SHOPPING OVER THE PHONE, MY MOBILE PHONE, TRYING TO FIND A JUDGE.

[p. 45] I TALKED TO THE CRIMINAL COURT'S COORDINATOR, MR. IVERSON.

HE FOUND ME JUDGE BASCUE.

I HAD MY RUNNER SUBMIT THE APPLICATION, FEDERAL AUTHORITIES AND MOTION BEFORE HIM, ASKING HIM TO SIGN THE ORDER SHORTENING TIME SO THIS MATTER COULD PROCEED IN AN ORDERLY WAY WITH EACH SIDE HAVING AN

OPPORTUNITY TO ADDRESS THE ISSUE SO WE WOULDN'T HAVE A CONTEMPT PROCEEDING AND SO THAT - IT DIDN'T DAWN ON ME, I HAVE TO SAY.

IT WAS AN EXAMPLE OF A LACK OF FORESIGHT ON MY PART TO THINK THEY WOULD DO BOTH THINGS SIMULTANEOUSLY.

I THINK IT'S INAPPROPRIATE, BUT I THINK IT'S INAPPROPRIATE TO ARGUE IT BECAUSE I DIDN'T BRIEF IT.

JUDGE BASCUE DENIED THE EX PARTE APPLICATION FOR THE ORDER SHORTENING TIME.

I HAVE A COPY OF WHAT HE DID THAT I CAN PRESENT TO YOU SO YOU CAN SEE HIS REASON.

I PREVIOUSLY SHOWED IT TO COUNSEL THIS MORNING, WHEN COUNSEL MADE THE COMMENT TO THE EFFECT ABOUT BRINGING PAPERS, BECAUSE I HAD A VERY THICK FILE.

I THOUGHT HE WAS REFERRING TO THE MOTIONS AND THE DOCUMENTS THAT I TOLD HIM I WAS BRINGING ON FRIDAY WHICH I COULDN'T GET ANYBODY TO FILE.

NEVER IN MY WILDEST DREAMS DID I THINK HE THOUGHT I WAS BRINGING DOCUMENTS WHICH MAY OR MAY NOT EXIST TO THE GRAND JURY, THEREBY WAIVING THE ATTORNEY-CLIENT PRIVILEGE AND RENDERING MOOT THE FIFTH AMENDMENT OBJECTION.

[p. 46] I SUBMIT TO YOU, ALTHOUGH I DON'T THINK I HAVE HAD THE PLEASURE OF APPEARING

BEFORE YOU BEFORE, THAT THAT'S NOT SOMETHING I WOULD DO, BECAUSE IT MAKES NO SENSE.

SO THEY THEN PROCEEDED TO TAKE MY CLIENT INTO THE GRAND JURY, AND I WENT WITH THE SPECIAL MASTER TO BE SEARCHED, WHEREUPON I PRODUCED THE TWO-PAGE COPY OF WHAT PURPORTS TO BE THE LETTER FROM LYLE MENENDEZ TO MISS BAKER.

THEN COUNSEL RELATED THE SUBSEQUENT SEARCH BY MR. ZOELLER AS WELL.

I WAS THEN FACED WITH THE PROBLEM OF HAVING MY CLIENT BE QUESTIONED ABOUT WHETHER SHE HAD PRODUCED DOCUMENTS, WHICH AN ANSWER TO WOULD ADMIT THEIR EXISTENCE, WHICH WAS ONE OF THE GROUNDS FOR BRINGING THE MOTION.

IT WOULD ALSO ACKNOWLEDGE HER CUSTODY AND CONTROL, WHICH WAS A SECOND GROUND FOR BRINGING THE MOTION UNDER THE ACT OF THE PRODUCTION DOCTRINE, AND IT COULD AUTHENTICATE THE DOCUMENTS, WHICH WAS THE THIRD GROUND.

SO, IN ANSWER TO A QUESTION, IT WOULD CONSTITUTE A WAIVER, PROBABLY, OF THE - CERTAINLY OF THE FIFTH AMENDMENT PRIVILEGE AND, IF APPLICABLE, THE ATTORNEY-CLIENT PRIVILEGE.

SO THE ONLY THING I COULD TELL MISS BAKER TO DO UNDER THE CIRCUMSTANCES CREATED EXCLUSIVELY [sic] BY THE PEOPLE AT THE OTHER

END OF THE TABLE WAS TO ADVISE HER TO TAKE THE FIFTH AMENDMENT, WHICH I DID.

NOW WE'RE BEFORE YOU, AND PROBABLY THEY ARE [p. 47] SEARCHING MY OFFICE.

THE COURT: DO YOU WANT TO RESPOND, MR. CONN?

MR. CONN: YES.

AS I SAID, AS FAR AS PROCEEDING BOTH WAYS SIMULTANEOUSLY, THAT IS, THE WITNESS WAS ORDERED TO APPEAR BEFORE THE GRAND JURY AND TO PRODUCE THE DOCUMENTS AND, AT THE SAME TIME, WE DID OBTAIN A SEARCH WARRANT.

THIS WAS SOMETHING THAT WE FULLY BRIEFED JUDGE POUNDERS ON, SO JUDGE POUNDERS WAS AWARE OF THE FACT THAT THERE WAS AN ONGOING GRAND JURY HEARING AT THE TIME HE ISSUED THE SEARCH WARRANT.

AND I AGREE, THERE IS AN INVESTIGATING OFFICER AT THIS TIME EN ROUTE TO SEARCH HIS OFFICE.

SO I THINK, PERHAPS, THE SIMPLEST SOLUTION WOULD BE THE COURT CAN DELAY OR SUSPEND ANY RULING ON THIS MATTER UNTIL THE OFFICER HAS HAD TIME TO RECOVER THE DOCUMENTS FROM THE SANTA MONICA OFFICE OF COUNSEL IF HE DOES, IN FACT, RECOVER THE DOCUMENTS.

AND I THINK THIS ISSUE WILL BE MOOT BECAUSE, AS I SAID, WE ARE NOT ASKING THAT

THE WITNESS BE HELD IN CONTEMPT IF WE DO, IN FACT, GET THE DOCUMENTS.

I UNDERSTAND SHE TURNED THOSE OVER TO HER ATTORNEY AND WAS ACTING UNDER ADVISE [sic] OF COUNSEL.

IF WE DO NOT RECOVER THE DOCUMENTS, THEN I THINK WE WILL BE FACED ONCE AGAIN WITH THE ISSUE OF CONTEMPT.

MR. GABBERT: MAY I ASK TWO POINTS?

FIRST OF ALL, AT THE TIME MY CLIENT PURPORTEDLY [p. 48] MADE THE STATEMENT THAT SHE HAD TURNED THE DOCUMENTS OVER TO HER COUNSEL, SHE WAS KNOWN TO BE REPRESENTED BY COUNSEL.

MR. ZOELLER KNEW THAT; BOTH DEPUTY DISTRICT ATTORNEYS KNEW THAT.

THEY KNEW BECAUSE THEY HAD SOUGHT MEETINGS WITH MY CLIENT, THOUGH THEY WERE NOT GOING TO BE TALKING TO HER ABSENT A GRANT OF IMMUNITY.

WHEN THEY EXECUTED THE WARRANT, THEY PROCEEDED TO QUESTION MY CLIENT IN A SITUATION THAT IF IT IS NOT LITERALLY CUSTODIAL, CERTAINLY IT HAS MANY OF THE TRAPPINGS.

BECAUSE I THINK WHEN YOU HAVE TWO DEPUTIES DISTRICT ATTORNEY AND TWO POLICE OFFICERS IN YOUR BEDROOM ON A FRIDAY EVENING, THAT'S A FAIRLY COERCIVE CIRCUMSTANCE. AND I

DON'T KNOW THAT ANYONE WOULD FEEL FREE TO LEAVE.

NOW, I HAVEN'T BRIEFED THE ISSUE OF WHETHER THE RIGHT TO COUNSEL ATTACHED, BECAUSE IT IS A PRE-INDICTMENT SITUATION. AND THE FEDERAL RULE IS NO EXCEPTION WHEN IT DOES.

I HAVEN'T LOOKED AT THE STATE RULE ON IT, BUT IT'S CLEAR TO ME THAT THERE SHOULD HAVE BEEN NO QUESTIONING OF MY CLIENT.

THEY HAD BEEN TOLD NOT TO DO THAT, AND CERTAINLY WITH RESPECT TO THE DISCIPLINARY RULES OF THE STATE BAR, THE COMMUNICATION WITH A REPRESENTED PARTY IS FORBIDDEN.

[p. 49] SO IF SHE MADE THOSE STATEMENTS, I CLEARLY DON'T THINK THEY ARE VOLUNTARY AND I DON'T THINK THEY WOULD CONSTITUTE A WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE, AND I DON'T THINK THEY SHOULD CONSTITUTE ANY TYPE OF ADMISSION ON HER BEHALF BECAUSE OF THE CONTEXT IN WHICH THEY WERE MADE.

ALSO, IF THE COURT DOES WHAT COUNSEL SUGGESTS, YOU WILL BE SAYING, IN EFFECT, ALTHOUGH I DON'T KNOW THAT YOU WOULD AGREE, DE JURE, BUT DE FACTO, THAT EVERYTHING THEY HAVE DONE IS JUST FINE AND THIS IS HOW WE OUGHT TO CONDUCT OUR GRAND JURIES IN LOS ANGELES COUNTY.

AND IF YOU DON'T DO WHAT WE SAY, WE GET SEARCH WARRANTS FOR EVERYWHERE, AND

THERE IS NO REASON TO HAVE COUNSEL, TO PREPARE MOTIONS, TO QUASH SUBPOENAS THAT COULD BE INCRIMINATING IN THE ABSENCE OF IMMUNITY.

AND THE DUE PROCESS CONSIDERATIONS THAT ARE INHERENT IN THE PRE-INDICTMENT CONTEXT HAVE NO APPLICATION.

AND THE FACT THAT IN AN EX PARTE - IN ANOTHER EX PARTE PROCEEDING A PROSECUTOR HAS PERSUADED ANOTHER JUDGE OF THIS COURT THAT WHAT THE CONTENTS OF THE OBJECTS HE SEEKS TO FIND, THE EXISTENCE OF WHICH HE DOES NOT KNOW, ARE SUCH THAT HE CAN CIRCUMVENT THE DISPOSITION OF THIS MATTER IN A COURT OF LAW AND RESULT TO THE SEARCH WARRANT PROCESS BOTH TO MY CLIENT, AS TO MY PERSON, MY BRIEFCASE AND MY EFFECTS, MY OFFICE.

I SUBMIT TO YOU THAT I DON'T THINK THAT'S APPROPRIATE. I THINK WE SHOULD HAVE A RULING ON THIS ISSUE.

[p. 50] THE RULING MAY RENDER THE WHOLE MATTER MOOT, SO RATHER THAN DO NOTHING, AS COUNSEL WOULD HAVE YOU DO, AND GIVE THE IMPRIMATUR OF APPROVAL OF THE PROCEDURE, I WOULD ASK THE COURT TO RULE ON THE ISSUES THAT I COULD IN GOOD FAITH - COULD NOT GET ANYONE TO FILE, MUCH LESS HEAR, BEFORE THE WHOLE SITUATION WAS CREATED.

THE COURT: WELL, AS FAR AS THE PROCEEDINGS THAT I'M HEARING ABOUT, WHILE THEY

ARE UNUSUAL, I DON'T BELIEVE THERE IS ANYTHING IMPROPER THAT'S HAPPENING HERE.

BECAUSE I THINK JUDGE POUNDERS CERTAINLY COULD HAVE PROPERLY FOUND THAT THERE IS PROBABLE CAUSE TO BELIEVE THAT THESE LETTERS, IF THEY EXIST, ARE EVIDENCE OF A CRIME COMMITTED BY LYLE MENENDEZ.

SO WE REALLY HAVE TWO SEPARATE PROCEEDINGS GOING.

I WILL STATE FOR THE RECORD, WHEN I CALLED THE ATTORNEY, THE GRAND JURY ADVISOR, INTO THE CHAMBERS ON RECORD, MY QUESTION TO HIM WAS, "IS THIS A GRAND JURY PROCEEDING SEEKING AN INDICTMENT AGAINST MISS BAKER?"

AND I WAS TOLD, "THIS IS A GRAND JURY INVESTIGATION AND NO INDICTMENT IS BEING SOUGHT NOW."

ON THE OTHER HAND, IT CERTAINLY APPEARS THAT AN INDICTMENT IS A POSSIBILITY AGAINST MISS BAKER BASED ON WHAT IS UNCOVERED BY THE GRAND JURY AND AS A RESULT OF THIS INVESTIGATION.

BUT CLEARLY THE PROSECUTION IS INTERESTED IN TWO SEPARATE THINGS:

ONE IS EVIDENCE AGAINST MR. MENENDEZ; AND,

[p. 51] THE OTHER MAY BE EVIDENCE AGAINST MISS BAKER.

I'M PROBABLY NOT GOING TO SATISFY ANYBODY VERY MUCH BECAUSE I'M NOT PREPARED TO RULE ON THE FIFTH AMENDMENT ISSUE SIMPLY BECAUSE WHETHER PRODUCTION OF DOCUMENTS IS THE INCRIMINATING EVENT, I HAVE NOT READ ANY OF THESE NICE FEDERAL CASES.

MY PRELIMINARY REACTION TO IT IS IT'S PROBABLY AN ISSUE THAT RAISES PRIVILEGE AND PROBABLY THE FIFTH AMENDMENT APPLIES AND THAT SHE WOULD BE ENTITLED TO A GRANT OF IMMUNITY BEFORE SHE COULD BE COMPELLED TO PRODUCE THESE DOCUMENTS.

I THINK THE PRODUCTION OF THE DOCUMENTS BY HER BOTH ACKNOWLEDGES THEIR RECEIPT BY HER.

THERE IS NO WAY SHE COULD COME INTO POSSESSION OF THESE LETTERS, I'M SURE, UNLESS LYLE WOULD HAVE MAILED THEM TO HER AND ALSO AUTHENTICATES THEM.

AND I THINK THAT'S INCRIMINATING.

THAT'S JUST MY THRESHOLD OPINION, AND I HAVE CHANGED MY MIND BEFORE WITH THE ASSISTANCE OF RESEARCH. BUT THAT'S WHERE I THINK WE ARE.

BUT THIS MAY BE ACADEMIC.

IF, IN FACT, THE DOCUMENTS ARE RECOVERED BY SEARCH WARRANT, THEN THE PEOPLE MAY HAVE NO FURTHER INTEREST IN EITHER TESTIMONY OR DOCUMENTS FROM MISS BAKER.

SO I'M GOING TO TAKE IT UNDER SUBMISSION TO GIVE ME AN OPPORTUNITY TO DO THE RESEARCH.

I THINK WHAT I'D BEST DO IS RESCHEDULE IT AND GIVE YOU A RETURN DATE RATHER THAN WAIT TO HEAR FROM YOU.

[p. 52] AND IF, IN FACT, IT WORKS OUT, YOU CAN LET ME KNOW AND WE CAN TAKE IT OFF CALENDAR.

WHAT DO YOU THINK, IN TERMS OF TIME?

WHEN DO YOU THINK YOU'LL KNOW WHETHER A SEARCH WARRANT PRODUCED THE INFORMATION YOU NEED?

MR. CONN: PERHAPS WEDNESDAY.

WE ARE GOING TO BE APPEARING ON THE SAME CASE IN ANOTHER COURT TOMORROW.

WE WOULD ASSUME BY WEDNESDAY WE WILL KNOW WHAT THE SEARCH WARRANT REVEALED.

THE COURT: MAYBE THE AFTERNOON WOULD BE EASIER FOR ME. THAT WOULD GIVE ME PLENTY OF TIME.

LET ME TRAIL THIS, THEN, TO WEDNESDAY, MARCH 14, AT 1:30.

MR. CONN: MISS NAJERA POINTED OUT - WOULD IT BE POSSIBLE TO DO IT ON THURSDAY?

IS THAT ALL RIGHT WITH EVERYBODY?

MR. GABBERT: THURSDAY AFTERNOON?

MR. CONN: OR MORNING, ACTUALLY.

MR. GABBERT: I CAN'T DO IT THURSDAY AFTERNOON.

I COINCIDENTALLY HAVE ANOTHER CLIENT BEFORE A FEDERAL GRAND JURY ON THURSDAY MORNING IN A TOTALLY UNRELATED MATTER.

THE COURT: THAT'S AN UNUSUAL SPECIALTY, BUT THERE YOU ARE.

IS THURSDAY MORNING ALL RIGHT?

MR. GABBERT: THURSDAY MORNING IS WHEN I HAVE TO BE THERE.

[p. 53] SO, FOR ME, IT WOULD HAVE TO BE THURSDAY AFTERNOON.

THE COURT: THAT'S FINE.

THURSDAY AT 1:30?

THE CLERK: MARCH 24.

THE COURT: I THOUGHT TODAY WAS THE 12TH.

I'M A LITTLE CONFUSED.

MARCH 24.

ALL RIGHT.

MISS BAKER, UNLESS YOUR ATTORNEY INSTRUCTS YOU OTHERWISE, COME BACK TO THIS COURT ON THURSDAY, MARCH 24, AT 1:30.

MR. WHITE: I WOULD ASK THE COURT TO ADMONISH COUNSEL THAT THE GRAND JURY PROCEEDING - AND THIS IS A GRAND JURY PROCEEDING - IS CONFIDENTIAL AND THAT HE IS LIABLE UNDER THE PENALTY OF PERJURY - EXCUSE ME - UNDER CONTEMPT OF COURT IF HE REVEALS ANYTHING THAT OCCURED [sic] DURING THIS HEARING OR IF HE DOES BEFORE THE GRAND JURY -

MR. GABBERT: I HAVE ONE QUESTION THAT'S NOT CLEAR IN MY MIND.

I HAD RICHARD HIRSCH AND HIS PARTNER COME DOWN BECAUSE IN NEARLY 17 YEARS I HAD NEVER BEEN THE SUBJECT OF A SEARCH WARRANT. AND I THOUGHT IT WOULD BE APPROPRIATE IF I WERE REPRESENTED BY COUNSEL.

SO I'M NOT CLEAR WHETHER I CAN COMMUNICATE WITH MY COUNSEL ABOUT WHAT WENT ON IN HERE TODAY.

IT WOULD SEEM TO ME I COULD.

THE COURT: IF THE PEOPLE DISAGREE, THEY CAN SAY SO.

[p. 54] I THINK YOU CAN COMMUNICATE WITH YOUR ATTORNEYS ABOUT ANYTHING CONCERNING THE SEARCH WARRANT BUT NOT ABOUT ANY GRAND JURY TESTIMONY THAT WAS REQUIRED OF YOUR CLIENT OR DOCUMENTS THAT WERE REQUIRED BY THE GRAND JURY.

BUT ANYTHING REGARDING YOU AND THE SEARCH, YOU ARE FREE TO TALK TO YOUR ATTORNEYS.

MR. GABBERT: THANK YOU.

THE COURT: DO YOU HAVE ANY PROBLEM WITH THAT?

MR. CONN: NO, YOUR HONOR.

MR. GABBERT: I HAVE ONE FURTHER REQUEST. I'M SURE IT WON'T BE A PROBLEM.

IF I CAN JUST GET THESE DOCUMENTS STAMPED FILED, I WOULD BE VERY HAPPY.

THE COURT: WE CAN MARK THEM "RECEIVED," BUT THERE IS NO CASE NUMBER AND THERE IS NO CASE IN WHICH TO FILE THEM.

BUT WE WILL INDICATE ON YOUR COPIES THAT THEY WERE RECEIVED BY THIS COURT TODAY.

MR. GABBERT: THANK YOU.

THE COURT: THANK YOU.

(THE PROCEEDINGS WERE CONCLUDED.)

THE GRAND JURY OF THE COUNTY
OF LOS ANGELES
STATE OF CALIFORNIA

IN RE THE GRAND JURY)
INVESTIGATION) CASE NO.
(SECRET)) (NONE)
WITNESS: TRACI LE BAKER.)
_____)

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) SS.
_____)

I, RICHARD B. COLBY, CSR, OFFICIAL REPORTER OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY CERTIFY THAT THE FOREGOING PAGES 1-54, INCL., COMPRISES A FULL, TRUE AND CORRECT TRANSCRIPT OF THE PROCEEDINGS REPORTED BY ME ON MARCH 21, 1994 IN THE ABOVE-ENTITLED MATTER.

DATED THIS 27TH DAY OF MARCH 1995.

/s/ Richard B. Colby CSR 1080
OFFICIAL REPORTER

EXHIBIT 3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	No. CV 94-4227
	)	RSWL (Ex)
Plaintiff,)	
)	
vs.)	
)	
DAVID CONN, CAROL)	
NAJERA, ELLIOT OPPENHEIM,)	
LESLIE ZOELLER and DOES 1)	
through X,)	
)	
Defendants.)	
_____)	

Deposition of PAUL L. GABBERT, taken on behalf of Defendants, at 648 Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, California 90012, commencing at 1:10 P.M. on Tuesday, the 4th day of April, 1995, before ELIZABETH A. HINES, CSR No. 9236, pursuant to Notice.

Reported by: ELIZABETH A. HINES, CSR No. 9236

Job No.: 95-0404EAH

* * *

[p. 33] Amendments and the attorney-client privilege.

Q. BY MR. BRAZILE: How did you even find that there had been a search conducted on her home prior to March 21, 1994?

MR. LIGHTFOOT. Same assertion.

Q. BY MR. BRAZILE: Do you know if anything was taken from her home as a result of the search of her home that occurred before March 21st, 1994?

MR. LIGHTFOOT: Same objection. Same assertions on the same grounds.

Q. BY MR. BRAZILE: Had you ever represented Ms. Baker before in any legal matters prior to February 11th, 1994?

(Whereupon, a discussion was held between the deponent and his counsel out of the hearing of the reporter.)

THE WITNESS: No.

Q. BY MR. BRAZILE: All right. Are you still representing Ms. Baker as of today?

A. Yes.

Q. On March 21st, 1994 you appeared in the downtown Los Angeles Criminal Courts building with Ms. Baker; is that correct?

A. Yes, sir.

Q. What time did you get there?

[p. 34] A. To the Criminal Courts building itself?

Q. Correct.

A. Between 7:00 and 8:00 a.m.

Q. Did you arrive alone or with someone?

A. I arrived alone.

Q. And did you meet Ms. Baker sometime that morning?

A. I did.

Q. When? What time?

A. Approximately 7:30 a.m.

Q. Did you meet her at the courthouse itself or in the parking lot or some other location?

A. In the courthouse.

Q. Did she arrive by herself or did she come with someone?

A. I don't know.

Q. Where in the courthouse did you meet her?

A. I believe I met her on the 13th floor where the grand jury room is located.

Q. And had this been your first time to represent someone who had to testify before the grand jury?

A. No.

Q. How many occasions prior to March 21st, 1994 had you represented someone who had to appear and testify before the L.A. County grand jury?

[p. 35] A. Oh, before the L.A. County grand jury, it may very well have been the first representation of a witness before the L.A. County grand jury.

Q. How many times prior to March 21st, 1994 had you represented someone who had to testify before any grand jury?

A. I would guess probably a dozen, maybe more.

Q. Was it your understanding when Ms. Baker testified before the grand jury that you would not be allowed to be in the grand jury hearing?

A. Yes.

Q. You knew that; correct?

A. Yes.

Q. What was your understanding as to where you would be when she was actually in the grand jury hearing room testifying?

A. Outside of it.

Q. Where outside of it?

A. In a waiting area, depending upon the particular physical layout of the Los Angeles County grand jury for that time period.

Q. Had that been the first time that you had gone up to the L.A. County grand jury where the grand jury room is located? Did you know the layout prior to March 21, 1994?

[p. 36] A. Well, I knew the 13th floor, and I think I have been in the grand jury sort of entryway although I can't recall when. I did not - I was not familiar with the layout of the various rooms. It wasn't familiar to me on March 21, 1994. I think I have been in there before. I don't remember when and it wasn't familiar to me.

Q. When a witness is going to testify before the grand jury, they have to check in with the bailiff; is that correct?

A. Yes. Correct.

Q. What time did Ms. Baker check in with the bailiff?

A. I think we actually checked in before her appointed time, which was either 8:00, 8:30, I believe. I think we checked in probably around 8:25, if I'm correct that it was 8:30.

Q. Did she check in with the bailiff?

A. I think I checked in for her. I don't recall whether she was by my side or in the hall at the time I checked her in.

Q. Who was present when you checked her in?

A. Either myself and the bailiff or myself, the bailiff and Ms. Baker.

Q. Anyone else?

A. There may have been other clerical personnel [p. 37] behind the counter, but I don't remember anybody in the immediate vicinity of the bailiff's desk.

Q. Where was the bailiff's desk located in relation to the grand jury hearing room?

A. It's in an anteroom or a waiting room area. It has a little desk.

Q. And when you checked in with the bailiff, did he have to check Ms. Baker's name off of a list of some kind?

A. Probably. I don't recall.

Q. Okay.

A. He seemed - my recollection is that it registered.

Q. Did he mark it down on a piece of paper, log it in in some way?

A. He may have. I think so. I don't remember.

Q. What happened after you checked her in?

A. We went outside to wait in the hallway.

Q. And what happened after you went outside into the hallway?

A. Sometime after we were waiting outside, sitting on a bench, Ms. - I believe Mr. Conn and Ms. Najera showed up.

Q. Then what happened?

A. I think we said, "Good morning," where there

* * *

[p. 50] recollection. I mean the subpoena says what it says, but he might not have shown up until 9:30. I think it's probably close to 10:00. Between 9- - I think it's between 9:30 and 10:00, but I could be off.

Q. When the two of you get back to the 13th floor, where do you go, you and Ms. Baker?

A. We stood around by the grand jury.

Q. For how long?

A. Until - until Mr. Conn, Ms. Najera and, I think some other people came back down.

Q. What time was that?

A. I don't recall.

Q. Give me your best estimate.

A. It's around - I think it was probably about - I don't know - 15 minutes later.

Q. Before 10:30 or after 10:30?

A. I think it was before 10:30.

Q. What happens when these other individuals come back?

A. Conn came down. I think Najera came down, and I think, I'm not sure, if Oppenheim - and I didn't know who Oppenheim was, but this fellow dressed in blue. Conn's secretary, I think, came down.

Conn came up to me, and I said - I don't know everything that was said, but the question by me was: [p. 51] "Where's the letter?"

Q. What did he say?

A. "It's still being typed up."

Q. What else was discussed?

A. That's all I remember.

Q. You don't recall him saying anything else at that point?

A. No.

Q. Did you say anything else to anyone at that point in time?

A. I might have looked at Ms. Baker and shrugged.

Q. What happened next?

A. I think Mr. Conn went in through the outer doors to the grand jury. I think Ms. Najera followed. If the other two people - the secretary and Oppenheim - came down, they went through the doors. I think either Ms. Baker and I followed or somebody came out and said - called Ms. Baker before the grand jury.

Ms. Baker needed to go to the bathroom and stated that. She then went to the bathroom, and if we were inside the grand jury anteroom or waiting room, we walked outside so she could go to the bathroom.

I was standing in the hall. Ms. Najera came out, stood in the hall with me and attempted to make some small talk with me.

[p. 52] Q. All right. Now, where was Ms. Baker at this point in time?

A. I presume in the ladies room.

Q. All right. Then what happened?

A. Ms. Baker returned from the ladies room. Ms. Najera, Ms. Baker and I went into the anteroom of the grand jury. And while we were standing there, Detective Zoeller came up and said, "Good morning, Mr. Gabbert."

Q. Where was Ms. Baker when Detective Zoeller came in and said good morning to you?

A. I believe she was standing adjacent to me.

Q. And where was your briefcase and your accordion file at that time?

A. I don't remember whether I was holding them or whether I had set them down on a conference table or a table in the anteroom.

Q. Now, this anteroom that you have testified to, is that also known as the witness room that was adjacent to the grand jury room?

A. I don't remember the name of it. It may have been the witness room.

Q. Was it the room where the bailiff was stationed?

A. Yes.

Q. What happened next?

[p. 53] A. I said, "Good morning, Detective Zoeller."

Q. Was the bailiff in that room at that time?

A. I don't remember. His desk was there. He was there most of the time. He may have been -

Q. What happens next?

A. Detective Zoeller then presented me with a search warrant, served a search warrant on me for my briefcase my person and Ms. Baker's person.

Q. What happens next?

A. I don't know if this is a precise chronology, but within seconds Ms. Baker was called before the grand jury.

Q. Who called her before the grand jury?

A. I don't know whether it was the foreperson or Mr. Conn. I was introduced to Mr. Oppenheim, who was the special master.

I said, "We'll need a private room." First I read the warrant. I was a little surprised. I was quite surprised and -

Q. Were you angry?

A. Absolutely.

When I said, "We'll need a private room," someone said, "We have one."

Q. Do you know who that was, who said, "We have one"?

[p. 54] A. No. I don't recall who it was. And I was led away to the room with Mr. Oppenheim. And Ms. Baker either shortly before or simultaneously was taken before the grand jury.

Q. Now, did you see Ms. Baker taken before the grand jury at that point?

A. I don't - I think I saw her pass out of my view. I don't remember if I literally saw her go through the door or not.

Q. All right. So -

A. And I may have said, "I want to call my attorney," at that point. Which if I said it, then it was denied.

Q. And who was your attorney that you wanted to call?

A. I wanted to call Michael Nasatir.

Q. As you were taken away to a private room, where was Ms. Baker? Could you see her?

A. I believe Ms. Baker - the last time I saw Ms. Baker, she was standing by this table and she was either on her way into the grand jury - I think she was on her way into the grand jury the last time I saw her.

Q. Prior to leaving with Mr. Oppenheim, the special master, for the search, did you ever see Ms. Baker actually enter the grand jury hearing room?

[p. 55] A. I don't recall if I saw her in motion or passing through a door. I think she was on her way in.

Q. But isn't it true you never saw her enter the grand jury hearing room?

A. I don't recall. I may have seen her enter the grand jury - I mean, may have seen her going through the doors, but this was all happening at once. And I have an image of her going into the door, but I'm not certain about it.

Q. And this door, which door are you referring to?

A. The door that was literally into the grand jury room.

Q. Did anyone escort her towards that door?

A. The foreperson may have. There were a lot of people there at that - you know, standing around that table. And my - I was distracted and my attention was divided.

Q. So, after you were escorted out of the room, where are you taken?

A. I'm taken into an office space.

Q. And who goes into this office with you?

A. Mr. Oppenheim.

Q. Anyone else?

A. No.

[p. 56] Q. What happens once you get into this office room?

A. I told Mr. Oppenheim, among other things, that the only thing that I had in my possession, meaning on my person or in my briefcase, that was responsive to the search warrant, was two photocopied pages - I believe it was two pages of a letter that was supposedly three pages in length that was purportedly written from Lyle Menendez to Tracy Baker. And that the prosecution already had that letter. Mr. Oppenheim kept taking the search warrant and reading it. He must have read the search warrant on numerous occasions. He then said - directed me to permit him to search my briefcase.

Q. What did you say?

A. I produced this letter. I told him that, "This was all there was. Did he still want to search?"

He said, "Yeah."

So I started - I told him that I had privileged documents, files, pertaining to Ms. Baker and other clients.

Q. In the briefcase or the accordion file?

A. I had two files pertaining to other clients in the briefcase. I had Ms. Baker's file in the accordion file. As I stated previously, I may have had one of Ms. Baker's files

in the briefcase. I can't recall if it [p. 57] was in the briefcase or the accordion.

He directed me, "Go ahead, I want to search even though notwithstanding what you said."

I then started to take items out of my briefcase. Sometime while this was happening, I was told that my client wanted to speak to me.

Q. Who told you that?

A. I believe it was Mr. Conn's secretary, the lady in pink. And there was, like, a knock on the door, and then the door opened, and she said this to me.

And I said, words to the effect, "I can't talk to Ms. Baker now. It will have to wait. I'm being searched."

Q. Did she tell you where Ms. Baker was?

A. She said - I don't know that she said it, but it was clear that Ms. Baker had to be outside of the grand jury because I couldn't talk to her in the grand jury. So by implication, it was clear to me that she wasn't in the grand jury, but I don't remember the woman stating where she was.

Q. Did the secretary ever say to you that Ms. Baker had ever gone before the grand jury while you were being searched?

A. No.

Q. Do you know whether or not she was before the

* * *

[p. 61] what David Conn said about that, and I answered with respect to the anteroom outside of the grand jury.

Q. Now, my question is: In the room being searched by Mr. Oppenheim, do you know whether or not Tracy Baker was testifying before the grand jury at the same time?

A. Yes.

Q. And how do you know that?

A. Without waiving any privileges, I know that from the way I was led away and I heard her name called before the grand jury. I know that Conn's secretary told me that the client wanted to talk to me, and that was later during the search after she had been before the grand jury. I know what Conn said at the conclusion - after my second search and before we went to the duty judge. And I know what Conn told Judge Cooper in the courtroom with respect to the question or questions to which Ms. Baker did not answer.

Q. What did he say?

A. Well, that's a problem. That's a problem because, see what happened was, when we went before Judge Cooper -

Q. For the contempt hearing; correct?

A. Correct.

- we didn't - in any event, it was part of [p. 62] the grand jury proceeding. So it was closed and it's secret.

In the context of that hearing, we discussed what happened to Ms. Baker and what happened to me, who was her lawyer, who was to be representing her, who was in a separate room being searched.

And I had called counsel by this point, who were on their way down or, in fact, may have even appeared while I was before Judge Cooper.

And I then asked Judge Cooper, at the conclusion of the proceeding before her, which portions of this proceeding I could discuss with my counsel since I was ordered not to discuss those portions of the hearing that dealt with what Ms. Baker said, as opposed to what happened to me.

And Judge Cooper said I could tell my lawyers what happened to me, but I couldn't tell what happened to Ms. Cooper - excuse me, to Ms. Baker because that was part of the grand jury secrecy.

You have to realize this was over a year ago.

Q. All right. Let me stop you right there.

When you are taken out of the room to be searched -

A. Mm-hmm.

Q. - Ms. Baker is still in that waiting room

* * *

[p. 67] Words to the effect, "it's urgent," or, "she can't wait," or, "she's wanted before the grand jury."

My saying, "that's too bad. They will have to wait. They created this situation. They will wait as long as it takes for me to finish here with the search."

Q. All right. Now, during the search, what materials in your possession did Mr. Oppenheim look through?

MR. LIGHTFOOT: There's a later search. This is the search in the room with Oppenheim we're talking about?

MR. BRAZILE: Correct. The very first search.

THE WITNESS: He looked through everything in my briefcase and in the accordion file.

Q. BY MR. BRAZILE: Did he look at anything else or search through anything else besides your briefcase and the accordion file?

A. Well, there were items in the briefcase -

Q. Right. I understand that.

Other than the briefcase and the accordion file, did he search through anything else?

A. No.

Q. How long did it take him to search through your briefcase?

A. I estimated approximately 20 minutes.

Q. How long did it take him to search through the [p. 68] accordion file?

A. Oh, I misspoke. The total search is approximately 20 minutes. My estimate is it took longer to go through the briefcase than to go through the accordion file. I don't know how much longer. If you want to me to estimate -

Q. Yes, I do.

A. I'm saying the accordion file probably took a few moments with the exception of one file, which was either

in the accordion file or in the briefcase, which contained my notes of my conversations, my privilege attorney-client conversations, with Tracy Baker about the subject matter of the grand jury investigation in which she was a target in a perjury investigation which he read over my objection on several occasions and wanted photocopies.

Q. All right. Now, after these – your briefcase and the file had been searched, what happened next?

A. Well, during when that was going on, I also called lawyers –

Q. Okay.

A. – from the room. I told the lawyers that I was on the wrong floor, a floor other than I was on. And there was the one interruption by Mr. Conn's secretary.

Q. Did she interrupt during the search or after or before?

[p. 69] A. During.

Q. Okay.

A. What happened was, Mr. Oppenheim took the two pages of the purported three pages, the photocopy, of the letter allegedly written by Lyle Menendez to Tracy Baker with him. And I took my briefcase with its contents including the two files – two other attorney-client files, which he read over my objection that contained privileged information, and my accordion file and went out in the anteroom.

Q. Mr. Oppenheim went out in the anteroom?

A. I went with him. I don't know who left the room, if we both left that room and went out in the anteroom.

Q. The anteroom, that's where the bailiff is located?

A. Right.

Q. What happened after you get out to the anteroom?

A. At some point shortly thereafter, Conn comes up. He says, "Mr. Oppenheim" or "the special master" – I forget how he referred to him – "has determined that none of the items in your briefcase are privileged; therefore, Detective Zoeller is going to search your briefcase as directed by the judge who issued the search warrant" – "by [p. 70] the magistrate that issued the search warrant."

I protested. I asked that it be delayed so that my counsel could appear. I said that, "If he had made a determination that there was nothing privileged in my briefcase, he was incorrect or in error."

And Conn indicated, I believe, with a gesture or with words – I forget which – that the search was going to take place or I could either open the briefcase and show them – that Zoeller was going to go through it himself with Conn, Najera or Zoeller looking on.

I started to repeat the procedure that I had gone through with Oppenheim, and I pulled out the two other files besides Ms. Baker's, the one file that contained the notes of my interviews with her.

And I told Zoeller, "There's nothing in here pertaining to the subject matter of the search warrant."

And Zoeller said, "I believe you. I didn't look in those two" - Zoeller did not look in those two files, the other files, meaning Baker's accordion file and the file that contained her notes - I went through everything else. I opened it up.

And at some point Conn left and Najera and Zoeller stayed there and looked through and flipped through all of the documents in the Tracy Baker file and the other items in my briefcase except for the other two clients' [p. 71] files.

Q. When you came out of the anteroom or came out of the room with Oppenheim and entered into this anteroom or the waiting room where the bailiff was located, where was Tracy Baker at that time?

A. I don't know if she was there at that point or she came back in at some point. I believe she was present during the second search by Zoeller.

Q. But you are not sure of where she was when you first entered that room with Mr. Oppenheim after his search; correct?

A. I'm sure she was in one of two rooms.

Q. Which two?

A. She was either before the grand jury or she was in the anteroom.

Q. But you don't recall which one?

A. Right.

Q. How long does the second search take place or how long does the second search last?

A. Five minutes.

Q. Okay.

A. Approximately.

Q. And the second search takes place in the anteroom or the bailiff's room?

A. Correct.

[p. 72] Q. And Ms. Baker is present during the second search?

A. She's present during part of it to the best of my recollection.

Q. The beginning, the end, the middle? What part of it?

A. She may have been present during all of it. If she wasn't there from the start, then it was some point after its initialization, but I believe she was there during some part of the second search.

Q. Do you know where she was during the part of the search that you couldn't see her or she wasn't in your eyesight?

A. I don't physically know. I believe she was in front of the grand jury. Those were the only two places where she was.

Q. Now, during the second search, what makes you believe that Ms. Baker was before the grand jury? What facts do you base that on?

A. That there was one of two places for her to be, and that's my best recollection.

Q. But you don't know which one it was. It was either one or the other; correct?

A. Correct.

Q. What happens after the second search is [p. 73] completed?

A. I believe after the second search is completed, I conferred with Ms. Baker on at least one occasion.

Q. About what?

A. About what she was being asked in the grand jury.

Q. All right.

A. And I did that in the anteroom. I did this in the anteroom with her.

Q. What time was it when the second search began, your best estimate?

A. Sometime after Oppenheim finished and before, I believe, 11:15 because the appearance before Judge Cooper was supposed to be at 11:30, I think. My best recollection.

Q. What time was the second search completed to the best of your knowledge?

A. Sometime before - sometime before 11:15.

Q. That's the best estimate you can give me, sometime -

A. Yeah.

Q. - before 11:15?

A. Yeah.

Q. Do you recall whether or not the second search

* * *

[p. 76] A. I don't recall. It may have happened.

Q. Was there ever occasion on March 21, 1994 where your client needed to speak with you and was not allowed to speak with you?

MR. LIGHTFOOT: I'm going to object to that. It calls for a conclusion on the part of this witness.

MR. BRAZILE: That he's aware of is what I want to know.

THE WITNESS: Well, I think that the time when she wanted - when they said my client wanted to consult with me and I was being searched was one such occasion.

Q. BY MR. BRAZILE: But during that, you don't know where she was, whether she was in the grand jury or some other place?

A. That's not really my testimony. I believe she was before the grand jury.

Q. Is there any other occasion you believe your client was before the grand jury and you didn't have access to her?

A. That's the only one I know of.

Q. Okay.

A. The correct answer to that question is no.

Q. You don't know of any other occasion?

A. Yes. I don't know of any other occasion.

Q. All right. And the one occasion that you are [p. 77] referring to is when the secretary came in and said your client needs to speak with you; correct?

A. Right.

Q. And you felt or your interpretation of that is your client was before the grand jury; correct?

A. Correct.

Q. Did you ever verify or confirm with Ms. Baker whether or not she was testifying before the grand jury -

MR. LIGHTFOOT: Objection.

MR. BRAZILE: Let me finish the question.

MR. LIGHTFOOT: Sorry.

Q. BY MR. BRAZILE: - when you were being searched?

MR. LIGHTFOOT: Objection. I assert the Fifth, Sixth Amendments and the attorney-client privilege on behalf of Ms. Baker.

MR. BRAZILE: Okay, Counsel, that question goes to the crux of this entire case, the one remaining claim. What I intend to do is, there are some other areas we can inquire into. I'm going to ask those questions. I'll come back and ask that line of questions last.

At that point, you will instruct him not to answer, and we are going to terminate the deposition. I'm going to request a meet and confer, and we can resolve it there. I'll file a motion. Okay?

[p. 78] Q. What time was your client's testimony before the grand jury completed, to the best of your knowledge?

MR. LIGHTFOOT: That again calls for speculation on the part -

MR. BRAZILE: I'm asking to the best of his knowledge.

THE WITNESS: Before 11:30.

MR. BRAZILE: All right.

Q. Now, what happens next after her grand jury testimony is completed?

A. Well, I think what you mean by your question, because it was the prosecution's interpretation that it wasn't completed. That's why we are going before the duty judge. I think what you meant is what happens next?

Q. Sure.

A. And what happened next was Conn told me we were going to go before the duty judge. It turned out to be Florence Marie Cooper, and I believe it was 11:30. And that was in the Department 110, and it's on whatever floor it is.

And I conferred with Ms. Baker. I called my office again to find out where the lawyers were that I had called. I went up, or down, whichever way it was. I think it was up to Department 110. Stood outside of the courtroom.

* * *

[p. 82] have personal knowledge, no.

Q. BY MR. BRAZILE: So you are just aware of one occasion where she wanted to talk to you and couldn't talk to you because you were being searched; is that correct?

(Whereupon, a discussion was held between the deponent and his counsel out of the hearing of the reporter.)

MR. LIGHTFOOT: Why don't you ask the question again.

MR. BRAZILE: Would you read the question back.

(The requested portion of the record was read by the reporter.)

THE WITNESS: Yes.

Q. BY MR. BRAZILE: Yes, that's correct?

A. Yes.

Q. All right. Are you aware of any occasion where she wanted to talk to you before she went into the grand jury room to testify and she was not allowed to because you were being searched or were made unavailable?

A. Well, I believe she wanted to talk to me when I was being led away to be searched.

Q. Why do you believe that? What did she say, if anything?

A. I don't recall the contents of what she said, but I could tell you by the way she looked that she looked [p. 83] extremely upset and flustered, that she did not want to be left alone with the people that were investigating her for perjury.

Q. Did she ever say to you, as you were being lead, "I have to talk to you. I need to discuss something with you?"

A. She may have. I don't recall.

Q. Do you recall any other occasion before she went in before the grand jury where she made a request to speak with you and she was not allowed to because you were unavailable for some reason?

A. No.

Q. Were there any occasions on March 21st, 1993 (sic) where you were prevented from giving legal advice to your client, Tracy Baker?

MR. LIGHTFOOT: Again calls for speculation on the part of the witness.

MR. BRAZILE: That he's aware of. All my questions are based upon his personal knowledge.

THE WITNESS: Other than I believe you meant 1994.

Q. BY MR. BRAZILE: I said - I'm sorry, 1994.

A. To be responsive to the question, other than the time I was being searched and the secretary said my client wanted to talk to me, no.

Q. Are you claiming any medical expenses as [p. 84] damages in this particular lawsuit?

A. No.

Q. Are you claiming any loss of earnings as part of your damages in this particular lawsuit?

A. No.

Q. Are you claiming any loss of earning capacity as a result of this action?

(Whereupon, a discussion was held between the deponent and his counsel out of the hearing of the reporter.)

THE WITNESS: No.

MR. BRAZILE: All right.

Q. Are you claiming any special damages at all as a result of this action?

MR. LIGHTFOOT: I'm going to object to the question as being ambiguous.

MR. BRAZILE: Are you instructing him not to answer?

MR. LIGHTFOOT: I'm asking you to explain what you mean by "special damages."

MR. BRAZILE: Okay. I'll rephrase the question.

Q. What are the damages that you are now claiming - as a result of your lawsuit that we're here on today?

MR. LIGHTFOOT: And I'm going to instruct him not to answer that because that calls for a legal

conclusion. Those matters are stated clearly in the complaint.

* * *

[p. 99] Q. Do you remember seeing his secretary after you left the first search?

A. I remember seeing her at some point during that morning in the anteroom, but I don't specifically remember seeing her in the anteroom after the first search.

Q. So you didn't mention during - while you were in the anteroom, you didn't mention to David Conn that your client had wanted to speak to you earlier; is that correct?

A. That's correct.

Q. Is there a reason you didn't mention it to him at that point?

A. Yes. There are several reasons.

First of all, whenever I asked Mr. Conn for anything, the answer was, "No. We don't have to do it your way. We won't wait for your counsel. The search is going to take place now. We don't have to do anything the way you want to." And it was a series of edicts from Mr. Conn.

Also formerly when I had discussed things with Mr. Conn, he had misrepresented to me that he was typing up a use immunity letter or having his secretary do so when the truth is, in fact, they were typing up a search warrant.

So it wasn't exactly on my mind to talk to Mr. Conn about that particular manifestation of his [p. 100] impatience in my misrepresentation of Ms. Baker, who he was now in the process of taking in front of a duty judge to be held in contempt.

Q. You did not feel it was important to speak to him or even mention the fact that you had not been allowed to speak to your client?

A. I thought lots of things were important, but this was not my first duty of business in that the point it -

Q. You didn't give any kind of insight into the fact that his secretary had mentioned anything to you while you were in the first search?

A. Not to my recollection, sir.

Q. Approximately how far away was David Conn's secretary when she made that statement?

A. I think she was at the door to a secretarial space or an office space. I guess she was about ten feet away.

Q. Did Mr. Oppenheim say anything to David Conn's secretary after she made her statement?

A. Not to my - not to my recollection.

Q. Did he make any kind of expression to the best of your knowledge?

A. Other than Mr. Oppenheim's gratuitous comments about various dress sizes on my personal calendar, he

* * *

[p. 107] I recall Conn being near there. Najera and Zoeller being there. Conn saying that Oppenheim had made the determination that there was nothing privileged in my briefcase. So Zoeller was going to search.

Conn was there at the inception of the search. Conn, Najera finished the search. Where Oppenheim was might have been to the - behind or to the side.

Q. During the second search, did you make a statement to anyone who was present at that time regarding whether or not your client had just been in the grand jury proceedings?

A. I don't think so.

Q. Did your client make any kind of representation that she had just been -

A. I don't think my client was saying much then, sir. I don't believe so.

Q. Therefore, you also didn't - did you make a representation that your client had attempted to speak to you or wanted to speak to you during the time of the first search while you were at the second search to any persons present?

A. I don't recall. Going through the second search, that was what my attention was focused on.

Q. And immediately following that search, did you have a discussion with your client?

[p. 108] A. As I have testified I had a conversation with my client after the second search. Whether it was immediately afterwards or not, I don't know. I don't recall.

Q. Do you recall whether it was in the anteroom?

A. I believe it was in the anteroom.

Q. Do you recall other persons were present?

A. I might have started to confer with her when there were people present, but I believe the bailiff left.

Q. You testified earlier during the first search that you called some lawyers; is that correct?

A. Yes.

Q. Do you recall who you attempted to contact?

A. Yes.

Q. Who would that be?

A. I called Michael Nasatir and Richard Hirsch and Vicky Podberesky.

Q. Did you speak to any of those attorneys?

A. I spoke to all three of them.

Q. Do they all work in one office?

A. Yes.

MR. LIGHTFOOT: P-o-d-b-e-r-e-s-k-y. Hirsch is H-i-r-s-c-h.

Q. BY MR. KRIEGER: At what point during the first search did you contact those attorneys?

* * *

EXHIBIT 4

03-21-94

D.D.A. DAVID CONN

(MENENDEZ CASE)

WITNESS LIST

1. LESLIE HOWARD / 1026 HRS. - 1054 HRS.
ZOELLER

2. TRACI LEE / 1054 HRS. - 1056 HRS.
BAKER

BREAK - 1056 HRS. - 1107 HRS.

BAKER TESTIMONY CONTINUED
1107 HRS. - 1112 HRS.

TO DEPT #110 FOR CONTEMPT PROCEEDINGS.

T.W. Fox
#112924

EXHIBIT 5

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,)	
Plaintiff)	
-vs-	)	No. 94-4227
DAVID CONN, CAROL NAJERA,	)	(RSWL) (Ex)
ELLIOT OPPENHEIM, LESLIE)	
ZOELLER, and DOES 1 THROUGH)	
X, Inclusive,)	
Defendants.)	

DEPOSITION OF TRACI L. BAKER, taken on behalf of Defendants, at 500 North Temple Street, Suite 648, Los Angeles, California, at 2:30 p.m., Thursday, May 4, 1995, before JENNIE A. ARNOLD, CSR No. 4182, pursuant to Notice.

Reported by: JENNIE A. ARNOLD, CSR No. 4182
Job No. 95-0504JAA

[p. 3] APPEARANCES

For Plaintiff:

LAW OFFICES OF
TALCOTT, LIGHTFOOT, VANDEVELDE,
WOEHRLE & SADOWSKY
BY: MELISSA N. WIDDIFIELD, ESQ.
13th Floor
655 South Hope Street
Los Angeles, California 90017
(213) 622-4750

For Deponent:

NASATIR/ HIRSCH & PODBERESKY
BY: VICKI I. PODBERESKY, ESQ.
2115 Main Street
Santa Monica, California 90405
(310) 399-3259

For Defendants ELLIOT OPPENHEIM and LESLIE
ZOELLER:

FRANSCCELL, STRICKLAND, ROBERTS &
LAWRENCE
BY: SCOTT D. MacLATCHIE, ESQ.
225 South Lake Avenue
Penthouse Pasadena, California 91101-3005
(818) 304-7830

For Defendants DAVID CONN and CAROL
NAJERA:

DE WITT W. CLINTON
County Counsel
County of Los Angeles
BY: KEVIN C. BRAZILE, ESQ.
Principal Deputy County Counsel
650 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1943

* * *

[p. 43] question?

(The record was read.)

MS. PODBERESKY: Mr. Brazile, on March 21st,
up to what time are you asking for?

MR. BRAZILE: Prior to her giving testimony before the grand jury. That was the last part of the question.

THE WITNESS: Between March 18th and the 21st, prior to my going into the grand jury?

BY MR. BRAZILE:

Q Correct. That's the question.

A Two.

Q Going back to March 21, 1994, I believe you told me earlier you met up with Mr. Gabbert on the 13th floor.

A That's right.

Q Do you recall going to the grand jury room with Mr. Gabbert on that particular day?

MS. PODBERESKY: Any time during that day? Is that your question?

BY MR. BRAZILE:

Q After you met up with Mr. Gabbert on the 13th floor, where did the two of you go?

A I believe the cafeteria area.

Q How long did you spend in the cafeteria area?

A Approximately, less than 30 minutes - between 5 and 30.

[p. 44] Q Did the two of you have any conversations while you were in the cafeteria?

A Yes.

Q Did he give you any legal advice of any kind while you were in the cafeteria?

A Yes.

Q How many times did he give you legal advice while you were in the cafeteria?

MS. PODBERESKY: I am going to object. It's vague. I think the witness has said they were meeting in the cafeteria. So there was that meeting. I'm not sure what your question was.

MR. BRAZILE: She also said she was given legal advice during the meeting in the cafeteria; is that correct, Miss Baker?

THE WITNESS: If I may, for one moment.

(The witness confers with her counsel out of the hearing of the reporter).

MS. PODBERESKY: Could you repeat your last question, please?

MR. BRAZILE: Miss Reporter, could you please read back the last question, please.

(The record was read.)

THE WITNESS: I can't pinpoint the amount of the times.

[p. 45] BY MR. BRAZILE:

Q Give me your best estimate.

A I don't know the amount of times.

Q More than once?

MS. PODBERESKY: I am going to object. The witness has answered the question. She can't answer that. It's a vague question, Mr. Brazile.

MR. BRAZILE: No, it's not.

MS. PODBERESKY: Yes, it is.

MR. BRAZILE: Counsel, are you instructing her not to answer? Yes or no?

MS. PODBERESKY: I'm not instructing her not to answer. I am asking you to please clarify your question. It's a vague question.

MR. BRAZILE: The question is, did he give her legal advice on more than one occasion when they were in the cafeteria.

MS. PODBERESKY: I think the problem, Mr. Brazile, is that my client considers the meeting in the cafeteria an occasion. So whatever advice was given during that occasion, there was advice given. And beyond that, I don't know that the question is clear. It's vague.

MR. BRAZILE: So the record is clear, what I'm trying to find out is did he give her one piece of legal advice? Two pieces of legal advice? Three or four? Whatever? [p. 46] You're not going to let me ask her what he told her?

MS. PODBERESKY: That's right.

MR. BRAZILE: So what I'm trying to find out from this witness is how many pieces of legal advice did she get.

MS. PODBERESKY: And my answer to you is "pieces of legal advice" is ambiguous, and my client can't answer that.

MR. BRAZILE: Are you instructing her not to answer?

MS. PODBERESKY: No, I am not. I'm just saying your question is vague and ambiguous. It's not possible to answer that kind of question.

BY MR. BRAZILE: Okay.

Q You can answer.

A I suppose one piece of advice. That's my only way to answer you.

Q What happened after the two of you left the cafeteria? Where did you go?

A We went back up to the 13th floor.

Q What happened when you got to the 13th floor?

A I believe Mr. Gabbert went to check me in.

Q Where were you when he went to check you in? Were you with him, or were you in another room?

A I was waiting in the hall area. There is some seating in the hall, marble benches, that I was sitting at.

Q What happened after he went to check you in?

A He came back out to sit with me and wait.

[p. 47] Q How long did you sit and wait?

A Exactly, I couldn't tell you, but not more than 45 minutes.

Q And during that 45-minute period of time, did Mr. Gabbert give you any legal advice of any kind?

A Unfortunately, the problem is I don't understand exactly understand what you mean by "legal advice."

Q Did he tell you anything about your testimony before the grand jury?

(The witness confers with her counsel out of the hearing of the reporter.)

THE WITNESS: I would say, yes.

BY MR. BRAZILE:

Q Did the two of you discuss during that 45-minute period of time what your testimony before the grand jury would be?

MS. PODBERESKY: I'm going to object on the basis of the Sixth Amendment and the attorney-client privilege and instruct my client not to answer.

BY MR. BRAZILE:

Q How long during that 45-minute period of time did the two of you discuss your grand jury testimony?

MS. PODBERESKY: I am going to object, in that the question assumes facts not in evidence. She indicated it was

* * *

[p. 55] A Yes.

Q Who?

A The jury forewoman - the woman that sits at the podium to your left. Is that the jury foreperson

Q Foreperson.

A Yes. The African-American woman - my recollection is she was near the door - Mr. Conn, Miss Najera, the court reporter and the grand jury members, various people.

Q Do you recall being asked any questions by Miss Najera while you were in the grand jury room before the actual grand jury?

A I don't recall.

Q Do you recall being asked by anyone while you were in the grand jury before the grand jury if you knew Lyle Menendez?

A Yes.

Q Who asked you that question?

A I don't recall exactly which one of them asked me.

Q Did Carol Najera ask you, when you were in the grand jury room, whether or not you knew Lyle Menendez?

A Again, my recollection is that it was Miss Najera.

Q And while you were in the grand jury room, did

* * *

[p. 58] attorney, Paul Gabbert?

A I was allowed to leave the room. When I got out of the room, Paul was not there. I sat for a moment, feeling very agitated, got up, and went out into - there is

an area where you first come in some glass, double doors where there is a place for a secretary-type person or a receptionist to sit – and I encountered a heavyset woman and I asked her did she know where Paul was. I don't remember if she actually said she knew where he was, but she indicated in some manner she would try to assist me in finding him.

Q Was she an attorney?

A I don't know.

Q Did she find Mr. Gabbert?

A She located him. And my recollection is that he was across toward the back of the large room in which the heavyset woman was seated in the front of this room. I saw Mr. Gabbert across the room, and I recall him – he was taking his jacket off is the memory I have fixed in my mind – and somehow, either verbally or using body language, or some way, I got the indication from him that I should go ahead and go back in and assert my Fifth Amendment right.

Q How did you get that indication from Mr. Gabbert?

A At this time I don't remember. I just remembered that that is – somehow that is what was conveyed to me from him.

[p. 59] Q Did the two of you make eye contact?

A I don't recall.

Q Did he say anything to you?

A Again, I don't recall specifically. I just know that's the action I took.

Q You say he had his jacket off; correct?

A Yes.

Q Was anyone with him?

A As far as speculating –

Q Did you see anyone in his presence?

A No, I didn't. Because I was only given partial view, from the vantage point I was standing into the room.

Q Now, this older gentleman that you said – this Special Master that was with Mr. Gabbert, did you see that when you had this picture of Mr. Gabbert with his coat off?

A I don't recall seeing him in the room. I do remember seeing him in the waiting area. I do remember him because he was dressed all in blue.

Q So when you asked the grand jury could you go and confer with your attorney, did you confer with your attorney?

A At that point, no.

(The witness confers with her counsel out of the hearing of the reporter.)

THE WITNESS: No.

[p. 60] BY MR. BRAZILE:

Q You did not; correct?

A That's correct.

Q Even though you made a request to do so; correct?

A Yes.

Q And the reason you did not consult with your attorney is what?

A He was in another room subject to a search.

Q Could you see anyone searching him?

A Not that I recall.

Q Did you ask anyone to convey a message to him?

A Yes. I initially asked the heavysset lady - she was dressed in pink, if you can go that far back - I don't remember who it was - if she could get my attorney, I needed to ask him something regarding whether or not I could answer a question. I wasn't specific with her, but I asked for her assistance.

Q Again, what did she tell you?

A Again, I don't remember. I had the recollection that she was in some way trying to be helpful to see that perhaps she would go to see if she could find him, or she called in that direction or something.

Q Now, this room that you saw Mr. Gabbert in, where were you when you were looking at him in this room?

A Are you familiar with where I am referring to?

[p. 61] Q I believe so, yes.

A Okay. I think there are double glass doors that you walk into, and you go to your right to get into the actual waiting area. There is a front desk reception area, and there's a hallway here (indicating). I was standing far enough back so I could see her typewriter and other office items back there. I was standing right about here (indicating,) and my recollection is that he was standing in a room somewhere in this neighborhood (indicating).

Q Did you see anyone else in the room that he was in at that time, that being Mr. Gabbert? Was anyone else in the room with him at that time?

A I heard him speaking, but I didn't see anybody in the room with him.

Q What was he saying?

A I don't know.

Q After you see Mr. Gabbert, and you don't communicate with him, what did you do next?

A Somehow communication took place, at least on my end. I felt that I should go back in and assert my Fifth Amendment right, although I can't specifically tell you whether it was through body language or verbal or what. But I went back into the room and asserted my Fifth.

Q Prior to you going back in the room to assert the Fifth Amendment right, did Mr. Gabbert say anything to you?

. . .

[p. 67] was saying the sentence, "May I have a moment with my attorney," Mr. Conn got up and was very upset. I don't know what caused him to be upset, but he started

discussing something with the jury foreperson that he was moving to hold this witness in contempt because I didn't produce something.

Q So at is that point, was that the third or fourth time that you had asserted the Fifth Amendment privilege?

A I had only asserted the Fifth Amendment twice. The third occasion that they began to ask me a question, of which I don't remember the exact content, I was about to ask for a moment with my attorney - which would have been the third time - that I asked for a moment with my attorney, and Mr. Conn got up and was angry about something and said that he was going to hold me in contempt of court which then, of course, added to my already hysterical nature at that time because I was whacked out. So -

Q Then what happened?

A I think I was let out of the room. Well, she admonished me, and I was let out of the room, and I was in the waiting area. By then, I believe Mr. Gabbert was back with me. Someone, I think Mr. Zoeller, delivered - no, I take that back - I'm not clear on this at all. At this time - I don't know if it's correct in time sequence, this is my memory - Mr. Gabbert was searched, his physical stuff, by Mr. Zoeller. And I believe Mr. Conn and Miss Najera were [p. 68] there for a period of time, although it's not my feeling they were there the entire time. They looked through Mr. Gabbert's personal -

Q When you say "they," who are you referring to?

A I will rephrase that. Well, "they" would be Mr. Zoeller, and I think Miss Najera and Mr. Conn were in the room. Mr. Zoeller was physically looking through Mr. Gabbert's briefcase and his man's purse. It's a purse. It wasn't a woman's purse.

Q When you went in to testify before the grand jury on the first occasion, did Mr. Gabbert ever indicate to you where he would be when you were testifying?

A Not that I recall.

Q Did he ever tell you, prior to you going in to testify before the grand jury, that he would go in the grand jury room with you?

MS. PODBERESKY: I am going to object. It calls for attorney-client privileged information, and instruct my client not to answer.

BY MR. BRAZILE:

Q Did you have any understanding whatsoever as to where Mr. Gabbert would be when you were in the grand jury testifying?

A Yes.

Q Where did you believe he would be?

[p. 69] A In the waiting area.

Q Did he tell you he was going to be in the waiting area, or did someone else tell you he would be in the waiting area.

MS. PODBERESKY: I am going to object to the extent it calls for attorney-client privilege and instruct my client not to answer.

BY MR. BRAZILE:

Q Why did you believe that he would be waiting for you in the waiting area while you were testifying before the grand jury?

(The witness confers with her counsel, Plaintiff and Plaintiff's counsel out of the hearing of the Reporter.)

MS. PODBERESKY: Can you repeat the question?

BY MR. BRAZILE:

Q Why did you believe that Mr. Gabbert would be waiting for you in the waiting room when you were testifying before the grand jury?

A Because I knew that he was not allowed to be in there with me. I believed he would be somewhere close by.

Q Let's go back to when you testified before the grand jury on the first occasion.

Did you tell anyone in the grand jury room when you first went in to testify that you were not able to speak

* * *

[p. 75] BY MR. BRAZILE:

Q You can answer.

A That was the period of time that seemed to me a lengthy time waiting for Paul to appear so I could confer with him. When he did not reappear, I was instructed by a member of the Court – I don't know if it was the bailiff or the African-American woman – that I had to go back

in, that I could not wait any longer, that I was ordered to go back in.

Q When you were ordered to go back in, you were asked another question?

A Same question.

Q What response do you give?

A I asserted the Fifth Amendment.

Q Did you say you were stating the Fifth Amendment, based upon the advice of counsel?

A I repeated what was on my card – similar statements. It was a long time ago so I don't know if the words you are using would be the exact quote.

Q So you don't know if you used the words, "Based upon the advice of counsel"; is that your testimony?

A That's correct.

Q So after this, I believe this is about the third time you have gone in before the grand jury now?

A Yes, this was my third appearance through the [p. 76] door.

Q Then what happens?

A They asked me the question. I said, "May I have a moment with my attorney." Mr. Conn got up, and I don't know what he said, but I recall him saying that he was moving to hold me in contempt. At that point, the Jury forewoman said whatever she needed to say, admonished me, and I was taken out into the waiting area again.

Q Then what happened?

A I think this is where Mr. Zoeller was searching Paul's personal items – briefcase and purse. After that, I was ordered down the hallway by the bailiff. Paul was not with me. He was gathering – he was not with me. I don't know what he was doing. The bailiff, court reporter, African-American gentleman, court reporter, some other folks were coming. We were being taken to another courtroom where a contempt of court hearing was to be taking place.

Q Then what happened?

A We were taken into the courtroom. Paul eventually caught up with us. Mr. Gabbert eventually caught up with us, and he wasn't allowed to go in the courtroom at first. I was sitting there alone with Mr. Conn. We were just waiting around for awhile. Eventually Mr. Gabbert was allowed to come in the room, and I think that's when what's called a hearing or proceeding took place.

* * *

[p. 87] A I don't recall.

Q Who else was present?

A I know Mr. Zoeller was there. And other than that, I don't have a specific reference.

Q And you described Mr. Zoeller was in the process, I think you described it, as searching?

A I don't know if he was in the process when I came out, but at some point thereafter shortly he was looking through Mr. Gabbert's personal items.

Q What was Mr. Gabbert doing at the time Detective Zoeller was doing this?

A He was standing, opening his briefcase and then eventually going item by item through his purse saying what they were.

Q Describing the contents to Detective Zoeller?

A (Witness confers with her counsel.)

He was actually removing them item by item, putting them on the table and stating, "This is not a letter, this is not a letter."

Q Who is saying that?

A Mr. Gabbert.

Q Mr. Gabbert is removing contents of his belongings, laying them on the table, and as he does, with each item he is saying "This is not a letter"?

A Maybe not with each item. But he said it more [p. 88] than one time.

Q Did he appear to be agitated as he was saying this?

A Yes.

Q Was his voice raised?

A Yes.

Q What else do you recall Mr. Gabbert saying during this time?

A I specifically don't recall any other phrases that I can remember right now.

Q What do you recall, if anything, being said by Detective Zoeller during this time?

A No recollection.

Q How long did this search that you have described take place?

A Why do you ask me these things?

Five or ten minutes.

Q During that time, the only two items that you saw being looked through were the purse and the briefcase; is that correct?

A That's correct.

Q What happened at the end of this? What I'm looking for is, did Detective Zoeller pick something up and say "This is what I want," and walk away, or did he stand around and Mr. Gabbert put his belongings back together? [p. 89] What happened at the conclusion of the search?

A I don't believe Mr. Zoeller found anything he was looking for. Mr. Gabbert's belongings were then - I think he gathered them back into where they should have been. And my next recollection is that we were then going to the room.

Q So other than yourself, Mr. Gabbert and Detective Zoeller, was there anyone else present when this search was occurring?

A Initially, Mr. Conn and, I believe, Miss Najera were there. But I don't believe they were there the entire

time. Now, that is just what I recall. I don't know if that's, in fact, the case.

Q Did either Mr. Conn or Miss Najera say anything to either Mr. Gabbert or Detective Zoeller at the time the search was occurring?

A I recall, not conversation, words coming out of one or two or both of their mouths. I don't know who it was directed to, but I remember them speaking at some point.

Q You don't recall what was said?

A No.

Q At the time you went down the hall for what you described as a contempt hearing, you testified that Mr. Gabbert ultimately made it into the room where you were with Mr. Conn?

A Yes.

* * *

[p. 95] room and expect me to know what's happening.
BY MR. MacLATCHIE:

Q When you say you had no prior knowledge of the questions being asked, I would assume you had no knowledge of the specific questions they would be asking you, word-for-word; is that correct?

A That, and really not a whole lot of indication of what else either.

Q Did it come as a complete surprise to you, out of the blue, that you were asked about your knowledge of Lyle Menendez?

(Witness confers with her counsel out of the hearing of the reporter.)

MS. PODBERESKY: You can answer the question.

THE WITNESS: No. It was not a complete surprise.

MR. MacLATCHIE: I have nothing further.

MR. BRAZILE: Well, I have nothing further either.

Can we stipulate that the court reporter will be relieved of her duties under the Code; that the original of the deposition transcript will be sent to Miss Baker's attorney; that within 30 days of receipt all counsel are to be notified of any changes to the deposition transcript. If we are not so notified within 30 days of receipt, there are to be no changes to the deposition transcript; that the witness will sign the transcript under penalty of perjury;

* * *

[p. 98] STATE OF CALIFORNIA)
) SS
COUNTY OF LOS ANGELES)

I, JENNIE A. ARNOLD, CSR No. 4182, a Court Reporter in and for the County of Los Angeles, State of California, do hereby certify:

That prior to being examined, TRACI L. BAKER, the witness named in the foregoing deposition, was by me

duly affirmed to tell the truth, the whole truth, and nothing but the truth;

That the said deposition was taken before me pursuant to Notice at the time and place therein set forth and was taken down by me; in shorthand and thereafter transcribed into typewriting under my direction and supervision; that the said deposition is a true and correct record of the testimony given by the witness:

That it was stipulated by counsel that said deposition may be read, corrected and signed by the witness under penalty of perjury.

I FURTHER CERTIFY that I am neither counsel for nor in any way related to any party to said action nor in any way interested in the outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name this 10th day of May 1995.

/s/ Jennie A. Arnold
Jennie A. Arnold

MICHAEL J. LIGHTFOOT
 MELISSA N. WIDDIFIELD
 TALCOTT, LIGHTFOOT, VANDEVELDE
 WOEHRLE & SADOWSKY
 655 SOUTH HOPE STREET, 13TH FLOOR
 LOS ANGELES, CALIFORNIA 90017
 (213) 622-4750

Attorneys for Plaintiff
 Paul L. Gabbert

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO.
Plaintiff	)	CV 94-4227-RSWL(Ex)
vs.	)	PLAINTIFF GABBERT'S
	)	CONSOLIDATED
DAVID CONN,	)	OPPOSITION TO
CAROL NAJERA,	)	DEFENDANTS' MOTIONS
ELLIOT	)	FOR SUMMARY JUDGMENT
OPPENHEIM, AND)	
LESLIE ZOELLER,	)	Date: October 2, 1995
	)	Time: 9:00 a.m.
Defendants.	)	Place: Courtroom 21

Plaintiff Paul L. Gabbert hereby submits the following memorandum in Opposition to the defendants' Motions for Summary Judgment.

DATED: September 18, 1995

Respectfully submitted,

MICHAEL J. LIGHTFOOT
 MELISSA N. WIDDIFIELD
 TALCOTT, LIGHTFOOT,
 VANDEVELDE WOEHRLE
 & SADOWSKY

/s/ Melissa N. Widdifield
 By: MELISSA N. WIDDIFIELD
 Attorneys for Plaintiff
 Paul L. Gabbert

I

INTRODUCTION

Defendants Conn and Najera on the one hand, and Zoeller and Oppenheim on the other, have filed motions for summary judgment. Because of the similarity of issues raised by the defendants, plaintiff Gabbert is hereby filing a consolidated opposition to the two motions.

Each of the defendants contends that he or she is entitled to absolute immunity in this case.¹ Defendants Conn and Najera claim prosecutorial immunity, while Zoeller and Oppenheim claim quasi-judicial immunity. Alternatively, the defendants assert that if they are not entitled to absolute immunity for their conduct in this case, they are nonetheless entitled to the protections of qualified immunity. Lastly, the defendants argue that plaintiff's claim for injunctive relief is barred.²

As revealed more fully below, all of the defendants' arguments are without merit. Indeed, as the evidence in this case amply demonstrates, the defendants violated

¹ Conn and Najera apparently claim absolute immunity with respect to the first, but not the second, search of plaintiff Gabbert.

² Defendant Oppenheim additionally contends in his motion that the Court's September 30, 1994 order dismissing certain of plaintiff Gabbert's claims should also apply to him despite the fact that defendant Oppenheim answered the Complaint and did not file a motion to dismiss. Plaintiff would agree to stipulate that defendant Oppenheim can be deemed to have filed the same motion to dismiss as defendants Conn and Najera and that plaintiff Gabbert filed the same response thereto.

plaintiff Gabbert's clearly established fourteenth amendment right to practice his profession free from governmental intrusion. Moreover, none of the defendants is entitled to either absolute or qualified immunity. Finally, based on the particular set of facts presented by this case, plaintiff is entitled to injunctive relief.

II

STATEMENT OF FACTS

On Monday morning, March 21, 1994 Traci Baker, accompanied by and represented by her attorney, plaintiff Paul L. Gabbert, checked in with the grand jury bailiff prior to her scheduled appearance before the grand jury. See Exhibit 1, Excerpt of Deposition Transcript of Paul L. Gabbert at pp. 4-5; Exhibit 2, Excerpt of Deposition Transcript of Traci L. Baker at pp. 34-35.³ Ms. Baker was unfamiliar with a grand jury and was frightened at the prospect of appearing before one. See Ex. 2, Baker Depo. at pp. 56-60. Of some solace to Ms. Baker was her belief that her lawyer would be available to her before and during her appearance should she need his advice. See Ex. 2, Baker Depo. at pp. 52-53.

While waiting in the hallway outside the grand jury room, plaintiff Gabbert and Ms. Baker were approached by defendants Conn and Najera. Defendants engaged plaintiff in a discussion regarding a possible grant of

³ A separately bound set of exhibits in support of plaintiff's opposition has been concurrently filed with this memorandum. Citation to exhibit page numbers shall refer to the imprinted "Bates" number, not to the document's original pagination.

immunity for Ms. Baker. The four of them went to defendant Conn's office to discuss the matter further. See Ex. 1, Gabbert Depo. at pp. 7-8; see also Exhibit 3, Excerpt of Deposition Transcript of David Conn at pp. 67, 70. Based on the conversation with defendants Conn and Najera, plaintiff Gabbert believed that Conn would prepare a draft letter of immunity for Ms. Baker that morning. Plaintiff and Ms. Baker returned to the grand jury area to wait for defendants Conn and Najera to return with the letter. See, Ex. 1, Gabbert Depo. at pp. 10-12. Instead of preparing an immunity letter as Conn led plaintiff Gabbert to believe, defendants Conn and Najera caused a search warrant for plaintiff Gabbert to issue. See Ex. 3, Conn Depo. at pp. 63, 80, 82; see also Exhibit 4, Excerpt of Deposition Transcript of Carol Najera at pp. 112-113.

Defendant Conn decided to obtain the warrant for plaintiff by the time plaintiff and Ms. Baker were in Conn's office discussing the immunity issue. See Ex. 3, Conn Depo. at p.86. Once having made the decision to seek the warrant, defendant Conn directed his assistant, Patti Jo Fairbanks, and defendant Zoeller to prepare the warrant application. Conn provided them with the necessary information to do so. See Ex. 3, Conn Depo. at pp. 80, 83-85. Although actually executed by defendants Zoeller and Oppenheim, the search warrant for the person of the plaintiff was caused to be issued and executed by defendants Conn and Najera. See Ex. 3, Conn Depo. at pp. 87-88. Defendant Conn specifically understood that the warrant would be executed just before Ms. Baker's scheduled testimony. *Id.*

Defendants Conn and Najera watched as defendant Zoeller served plaintiff with the warrant and defendant

Oppenheim took plaintiff Gabbert into a separate room to conduct the search. *See* Ex. 3, Conn Depo. at pp. 89-90; Ex. 4, Najera Depo. at p.120. Defendants Conn and Najera then entered the grand jury room and had Ms. Baker called as a witness. *See* Ex. 3, Conn Depo. at pp. 90, 92-93.

Ms. Baker was extremely apprehensive and nervous prior to her grand jury appearance. Her distress was due in part to the inherently intimidating nature of the grand jury itself, but also due to the fact that in the hallway moments earlier, defendant Conn has asked plaintiff Gabbert, in Ms. Baker's presence, whether plaintiff would surrender Ms. Baker in Los Angeles or whether she would have to be arrested in Orange County. *See* Ex. 2, Baker Depo. at pp. 38, 57. Plaintiff Gabbert knew that Ms. Baker wanted to speak with him before she went into the grand jury room, but he was unable to do so because he was detained by defendant Oppenheim. *See* Ex. 1, Gabbert Depo. at p.25. As Ms. Baker described her state of mind at that point,

Suddenly there's a search warrant. My attorney is taken away from me. And I was shaking, really upset, I don't know what to do. I just know I'm, going to go into a room with a bunch of people I don't know that are going to ask me questions, and I don't know what I should say. So I come out looking for the only rock that I have for help, and he wasn't there. So I was stuck with some bailiff guy and nobody sitting there. I'm not saying that to be dramatic. That is exactly how I felt.

See Ex. 2 Baker Depo. at p.57.

In response to the first question put to her before the grand jury, Ms. Baker stated that she had not been able to confer with her attorney because he was with the special master. *See* Exhibit 9, Transcript of Grand Jury Testimony of Traci L. Baker at p.199.⁴ She then asked for an

⁴ As noted, plaintiff has attached a copy of Traci Baker's March 21, 1994 grand jury testimony as an exhibit to this Opposition. The transcript was obtained by plaintiff in the course of discovery via a Superior Court order. Plaintiff had asked defendants Conn and Najera early on in this litigation to voluntarily produce the requested transcript. Defendants refused to do so on the grounds of grand jury secrecy, despite the fact that they themselves had already obtained the transcript. Plaintiff was forced to seek a court order to obtain what the defendants already had. On May 19, 1995, the Hon. J. Stephen Czuleger ordered defendants to produce the transcript of Ms. Baker's testimony and strongly admonished County Counsel for their conduct, which the Court described as "sandbagging." *See* Exhibit 10, Transcript of Superior Court hearing at pp. 246-247, 252. Now, in contravention of the Superior Court's order, and in violation of grand jury secrecy rules, defendants Conn and Najera have attached a copy of defendant Zoeller's grand jury testimony, as well as the opening statement by the prosecutor, as an exhibit to their motion for summary judgment. *See* Exhibit 2 to defendant Conn and Najera's Motion for Summary Judgment. Not only was plaintiff not previously provided with this portion of the transcript (in fact, it was clearly redacted from the transcript provided to plaintiff), but its disclosure constitutes a flagrant and cavalier disregard for the grand jury secrecy provisions of California's Penal Code (*see* §§ 924 *et seq.*), as well as the specific terms of the Superior Court's order, dated May 19, 1994. Moreover, since the additional portion of the transcript is irrelevant to the issues raised by the defendants in their motion, the only possible purpose for and motive for the defendants conduct is to attempt to impugn Ms. Baker's character. A Federal Court should not countenance such conduct.

opportunity to consult with plaintiff Gabbert. *Id.* Ms. Baker was unable to do so, however, because plaintiff Gabbert was being searched. *See* Ex. 2, Baker Depo. at p.44. Plaintiff Gabbert requested that the grand jury proceedings be delayed until the search was completed so that he could fulfill his obligation to his client and be available to counsel her. *See* Ex. 1, Gabbert Depo. at pp. 16, 17-20, 27. This request was denied and Ms. Baker was commanded to return to the grand jury room. *See* Ex. 1, Gabbert Depo. at pp. 17, 19-20; Ex. 2, Baker Depo. at p.47.

Ms. Baker returned to the grand jury room distressed and upset. *See* Ex. 2, Baker Depo. at pp. 49-50. In response to the next question, Ms. Baker again asked to confer with her attorney. *See* Ex. 9, Baker Grand Jury Transcript at p.200. Again, plaintiff Gabbert was not available to confer with his client because he was still being searched. *See* Ex. 2, Baker Depo. at pp. 49-50. Ms. Baker was ordered back into the grand jury room. *Id.* at p.50. She was now in an even greater state of agitation because she did not know whether she had responded to the previous question appropriately and was also unsure as to how to respond to the pending question. *Id.* In response to the third question, Ms. Baker once again sought to confer with plaintiff. *See* Ex. 9, Baker Grand Jury Transcript at p.201. Upon exiting the grand jury room on this occasion, Ms. Baker was met by the search of plaintiff Gabbert by defendant Zoeller. *See* Ex. 2, Baker Depo. at pp. 51-52. Defendants Conn and Najera requested that defendant Zoeller perform this search and also participated in at least a portion of this search. *See* Ex. 1, Gabbert Depo. at p.22; Ex. 2, Baker Depo. at pp. 51-52; Ex. 4, Najera Depo.

at p.131; *see also* Exhibit 5, Excerpt of Deposition Transcript of Leslie Zoeller at pp. 150, 153-154. Shortly thereafter, Ms. Baker, still separated from plaintiff Gabbert, was taken to Department 110 of the Superior Court in connection with contempt proceedings initiated by defendants Conn and Najera. *See* Ex. 2, Baker Depo. at p.55.

On the basis of the above factual allegations, this Court previously ruled, in the context of defendant Conn and Najera's motion to dismiss, that plaintiff had stated a claim for a violation of his fourteenth amendment right to practice his profession without governmental interference. *See* Court Order dated September 30, 1994 (hereinafter "Order"), attached hereto as Exhibit 8. In addition, this Court held that defendants Conn and Najera were not entitled to absolute immunity for the alleged conduct. The current motions for summary judgment present no additional justification to disturb that ruling.

III

ARGUMENT

A. THE DEFENDANTS' BURDEN OF PROOF ON A MOTION FOR SUMMARY JUDGMENT

A party seeking summary judgment bears the burden of proof to establish that there is "no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.Proc. 56(c); *British Airways Board v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978). The moving party must convince the court that there is an absence of evidence to support the opposing party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106

S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). Moreover, where, as here, a defendant moves for summary judgment based on an affirmative defense for which he bears the ultimate burden of proof, he must demonstrate by admissible evidence that there is no triable issue of fact as to each element of that affirmative defense. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986).

In ruling on a summary judgment motion, the district court must exercise care to protect the parties, rights to have fact-based disputes decided by a jury, and avoid trial by affidavit. As the Supreme Court has stated:

Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

While early determination of the issue of qualified immunity is always encouraged, summary judgment doctrine is not to be skewed from its ordinary operation to give special favor to the defense. Thus, "[h]ere, as in any context, summary judgment for the movant is appropriate only if 1) there are no genuine issues of material fact, and 2) on the undisputed facts the defendant as movant is entitled to judgment as a matter of law." *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992).

B. THE DEFENDANTS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY

As this Court has noted, there is a presumption that qualified, rather than absolute, immunity is sufficient to protect government officials and, therefore, absolute immunity is sparingly accorded. See Ex. 8, Order at p.175, citing, *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 1939, 114 L.Ed.2d 547 (1991). This presumption should apply to each of the defendants in this case.

1. Defendants Conn and Najera

Defendants Conn and Najera apparently claim that they are entitled to absolute immunity in connection with the first search on the grounds that 1) they were acting in their roles as advocates while the search was being conducted, and 2) they did not personally participate in this search. In essence, these defendants would have this Court conclude that they should be cloaked with the full mantle of absolute immunity in a situation where they set in motion an investigatory process which culminated in a series of unconstitutional acts, had others carry out those acts at their direction, and then closeted themselves in what they believed to be the safe haven of a grand jury room while the unconstitutional conduct was committed. Defendants' argument is unsupportable in law and fact.

a. Conn and Najera Acted As Investigators

It is well-established that prosecutors are absolutely immune for conduct undertaken in their roles as advocates, including the presentation of evidence before a

grand jury. *Buckley v. Fitzsimmons*, ___ U.S. ___, 113 S.Ct. 2606, 2615, 125 L.Ed.2d 209 (1993); *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 1941 n.6, 114 L.Ed.2d 547 (1991). Plaintiff does not dispute this principle. However, it is equally well-established that prosecutors acting in their roles as investigators, not advocates, have no such immunity. As courts have observed,

A prosecutor who assists, directs, or otherwise participates . . . in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities of deciding which suits to bring and conducting them in court.

Marrero v. City of Hialeah, 625 F.2d 499, 503 (5th Cir. 1980); *Joseph v. Patterson*, 795 F.2d 549, 556 (6th Cir. 1986), cert. denied, 481 U.S. 1023 (1987).

Here, this Court has already ruled that defendants Conn and Najera were acting in their roles as investigators in this matter. See Ex. 8, Order at pp 1777-178.⁵ Furthermore, as discussed below, substantially all of the allegations upon which the Court based this ruling, and its related ruling that defendants Conn and Najera participated in both the first and second searches, have been

⁵ The question of whether defendants Conn and Najera were acting as investigators or advocates when engaging in the conduct at issue here was fully briefed in the context of defendants' Rule 12(b)(6) motions. Plaintiff will not burden the Court by resubmitting the entirety of his previous argument, but would incorporate by reference his opposition to defendants' motion. See Plaintiff Gabbert's Opposition to Defendants' Motion to Dismiss at pp. 10-14, filed on August 26, 1994.

factually supported in discovery.⁶ In contrast, the defendants have presented no new evidence to substantiate their claim that they were acting as advocates and are, therefore, entitled to the extraordinary protection of absolute immunity.

b. Defendants Conn And Najera's Conduct Constituted Participation In The Unconstitutional Conduct

In its Order, the Court identified the particular conduct of defendants Conn and Najera which caused it to conclude these defendants were participants in the unconstitutional conduct at issue. Those allegations are now supported.

First, the Court pointed to the fact that plaintiff was delayed by defendants Conn and Najera "at the courthouse under the pretext of supplying plaintiff with a letter granting his client immunity, until plaintiff was served with a search warrant." See Ex. 8, Order at p.177. As defendant Conn conceded in his deposition, he brought plaintiff Gabbert and Ms. Baker up to his office to discuss a possible grant of immunity for Ms. Baker, indicated that he would have an immunity letter prepared, and instead caused a search warrant for plaintiff Gabbert to be issued. See Ex. 1, Gabbert Depo. at pp. 43-53; Ex. 3, Conn Depo. at pp. 71-73, 75, 82, 85, 86. Second, the Court noted that defendants "Conn and Najera were present when plaintiff was served with a

⁶ At minimum, as the evidence reveals, there are genuine issues of material fact in dispute with respect to these allegations.

search warrant." See Ex. 8, Order at p. 177. See also Ex. 3, Conn Depo. at p.89; Ex. 4, Najera Depo. at pp. 115-118. Third, the Court observed that defendants "Conn and Najera were present for the second search, and "viewed plaintiff's documents during the search, after Conn informed plaintiff that Special Master Oppenheim had determined nothing in the briefcase and files was privileged." See Ex. 8, Order at p.177. See also Ex. 1, Gabbert Depo. at pp. 21-23; Ex. 2, Baker Depo. at pp. 51-52; Ex. 3, Conn Depo. at pp. 94-97, 99-100, 135; Ex. 4, Najera Depo. at pp. 123-124, 130-131.

As this Court previously held, in language equally applicable to the current motion,

The conduct of Defendants Conn and Najera constitutes participation in the investigations. Further, . . . these investigations were not connected to Defendants' role as advocates, but, rather, were pre-indictment evidence-gathering more associated with police functions.

See Ex. 8, Order at pp. 177-178. As the Court concluded,

It seems clear that plaintiff's allegations, [now supported in the record], do state facts showing direction and participation by defendants. Moreover, it is apparent that such direction and participation would be considered a proximate cause of the constitutional deprivations which plaintiff alleges. Defendants' lack of causation defense thus fails.

Id. at p.181.⁷

⁷ The full extent of these defendants' participation in the unconstitutional acts complained of is discussed at greater length in Section C.2.a, *ante*.

2. Defendant Zoeller

Defendants Zoeller and Oppenheim claim quasi-judicial immunity, each on a different basis. Defendant Zoeller essentially claims that, because he was serving a search warrant which this Court has ruled was supported by probable cause, he is immune from liability for any constitutional deprivation that occurred during, or as a result of, the search. Zoeller cites to *Coverdell v. Department of Social & Health Services*, 834 F.2d 758 (9th Cir. 1987) for the correct proposition that a public officer may not be sued for conduct authorized pursuant to a valid court order. As even the *Coverdell* court recognized, however, such immunity can be extended only when there is no allegation or proof that, in executing the order, the defendant "exceeded its scope or acted improperly in any other way." *Id.* at 765 (emphasis added).

Here, the issue is no longer whether the search warrant itself was valid on its face, or whether Zoeller had the authority to serve it. Instead, the issue is whether defendant Zoeller and others served and executed the warrant in such a manner and at such a time that plaintiff's fourteenth amendment right to pursue his profession was violated. If indeed it was the defendants' aim to time the execution of the warrant so as to impede plaintiff's ability to represent Ms. Baker or it, in fact, did so, which conduct this Court has deemed a fourteenth amendment violation, then the propriety of the warrant

or the scope of the search under the fourth amendment is wholly irrelevant.⁸

3. Defendant Oppenheim

Defendant Oppenheim asserts that he is entitled to quasi-judicial immunity on the basis that, as a special master, he is entitled to the same immunity accorded to court-appointed receivers and conservators. Defendant Oppenheim's argument fails, based both on the California statute which governs special masters, as well as simple logic.

First, California Penal Code § 1524(d) states that, for the purposes of immunity against claims and actions, the special master "shall be considered a public employee, and the governmental entity which caused the search warrant to be issued shall be considered the employer of the special master. . . ." Thus, Oppenheim is entitled to no broader immunity than may be available to the other defendants in this case. At best, he can assert an entitlement to qualified immunity⁹ (a claim which also fails, as

⁸ Defendant Zoeller's argument, taken to its extreme, would give an officer carte blanche to engage in any number of assorted constitutional violations during the execution of a search, so long as a valid warrant was first obtained. Where, as here, there is at least a dispute as to the scope and intent of the illegal acts, the validity of the warrant will only confer qualified immunity in the cases of fourth amendment claims concerning the face of the warrant.

⁹ This is especially true insofar as counsel for defendant Oppenheim has indicated to plaintiff's counsel that Oppenheim is to be considered an employee of the Beverly Hills Police

discussed below.) Unlike court-appointed receivers or conservators, a special master's role, as legislatively defined, is limited and brief, requiring little in the way of the exercise of discretion or independent judgment. A special master's proper task, pursuant to Penal Code § 1524, should entail no more than the initial segregation of potentially privileged materials. On the other hand, a typical receiver or conservator acts as an agent of the court and is vested with wide-ranging discretion with respect to long-term and complicated matters, conduct to which judicial immunity logically must extend.

Moreover, it is axiomatic that a defendant will only be shielded from liability in connection with acts undertaken in the performance of discretionary as opposed to ministerial duties.¹⁰ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *Anderson v. Creighton*, 483 U.S. 635, 637-38, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987); *Davis v. Holly*, 835 F.2d 1175, 1178 (6th Cir. 1987); *People of Three Mile Island v. Nuclear Regulatory Commissioners*, 747 F.2d 135, 143 (3d Cir. 1984). As the Third Circuit has defined the two concepts:

'Discretionary-decisional' acts are those which involve significant decision-making that entails

Department for the purposes of this litigation. See Declaration of Melissa N. Widdifield. Therefore, under any set of circumstances, defendant Oppenheim is only entitled to the qualified immunity accorded to law enforcement officers.

¹⁰ Even if defendant Oppenheim's duties under section 1524 could be characterized as discretionary, this again entitles him not to absolute immunity, but merely qualified immunity. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

personal deliberation, decision and judgment. 'Ministerial-operational' acts involve the execution or implementation of a decision and entail only minor decision-making.

Davis v. Holly, 835 F.2d at 1178 (citations omitted). Here, even a cursory review of section 1524 reveals that its provisions are mandatory or ministerial. Accordingly, the court in *Geilim v. Superior Court*, 234 Cal.App.3d 166, 285 Cal.Rptr. 602 (1991), the leading case analyzing section 1524, observed that the statute's provisions are phrased as "requirements" and the procedures specified "must be followed." 234 Cal.App.3d at 172-73, 285, Cal.Rptr. at 605-607. As the California courts and legislature have recognized, the traditional policy grounds for extending absolute immunity do not apply in the present case, and, in the complete absence of relevant authority, this Court should not create such immunity.

C. THE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

1. Plaintiff's Right To Pursue His Profession Was Clearly Established

All of the defendants assert that plaintiff's fourteenth amendment right to practice his profession was not clearly established. Defendants point to *Keker v. Procunier*, 398 F.Supp. 756 (E.D. Cal. 1975) as if it were the only recorded case which recognizes such a right, and labor mightily to distinguish *Keker* from the facts of this case.

As a threshold matter, as this court recognized in its order, a plaintiff need not unearth prior case law on identical facts to show that particular right is "clearly

established by law." Rather, the contours of the right need only be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official's action is protected by qualified immunity unless the very action in question has previously been held unlawful; but the unlawfulness must be apparent in the light of pre-existing law. *Anderson v. Creighton*, *supra*, 483 U.S. 635, 637, 107 S.Ct. 3034, 3039 (citations omitted).¹¹ This Court previously found that the fourteenth amendment right to practice one's profession "has been found to exist[.]" citing to *Keker*, *supra*, and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). See Ex. 8, Order at p. 190.¹²

The right at issue here is more than "clearly established" – indeed, the judiciary's recognition of it predates the more contemporary categories of procedural and due process rights which came in vogue only in the last three decades. The *Keker* court, in readily acknowledging the existence of a "right to practice law," found as a matter

¹¹ The Ninth Circuit has recently reaffirmed the principle that the precise conduct in question need not have been previously held unlawful. Thus, in *Newell v. Sauser*, 95 Daily Journal D.A.R. 12365 (Sept. 15, 1995), the Court held that, based on generally recognized first amendment principles, it was "clearly established" that a prison inmate had a constitutional right to possess legal materials in his cell. *Id.* at 12366.

¹² Indeed, if the Court were convinced that, as a matter of law, such a right was *not* clearly established, then the Court surely would have dismissed the claim with prejudice on defendants' Rule 12(b)(6) motion.

beyond dispute that "the fourteenth amendment guarantees an individual the right to engage in any of the common occupations or professions of life," and that "such a right is both a 'liberty' and 'property' right protected from state deprivation or undue interference." *Id.* at 760. The court's holding was based on such longstanding Supreme Court decisions as *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625 (1923), *Green v. McElroy*, 360 U.S. 474, 79 S.Ct. 1400 (1959), and *Board of Regents v. Roth*, *supra*. *Id.* The *Keker* court also relied on more recent federal law recognizing the rights of lawyers to practice their profession free of governmental interference. *Id.*, citing *Wounded Knee Legal Defense/ Offense Committee v. F.B.I.*, 507 F.2d 1281 (8th Cir. 1974). Thus, while the precise facts at issue in this case have, not surprisingly, never been addressed in a published opinion,¹³ the defendants' undue interference with plaintiff's practice of his profession constituted an obvious and unmistakable violation of his fourteenth amendment right, under law that has been clearly established for over fifty years.

Defendants struggle to distinguish the present case from those like *Keker*, cases in which the client had been criminally charged and thus had a sixth amendment right

¹³ It is worth noting that the conduct alleged in *Keker*, which the court readily identified as a fourteenth amendment violation in light of clearly-established law, was not nearly as egregious as the conduct at issue here. In *Keker*, the governmental "interference" amounted to little more than stuffy interview rooms and glass partitions. Here, by contrast, an attorney was physically separated from his client and prevented from communicating with her, during the very time period for which he was retained to give her counsel.

to counsel. This argument, however, is entirely irrelevant to the analysis at issue. Plaintiff Gabbert does not, and need not, assert that Ms. Baker had a sixth amendment right to counsel at the grand jury stage, in order for Gabbert's fourteenth amendment claim to stand.

Contrary to defendants' assertions, none of the cases cited by them, including *Keker*, hold that an attorney's right to practice his profession is limited to representation of a criminal defendant whose sixth amendment rights have attached. Indeed, in *Keker*, the court addressed the potential sixth amendment violation there as a separate and independent constitutional basis for the attorney's suit. *See Keker* at 760. The existence of a sixth amendment right was never viewed as a pre-requisite to the attorney's fourteenth amendment claim. *Id.* at 764-65. In short, the attorney's claim is clearly not "derivative" of the client's sixth amendment right to counsel, as defendants would disingenuously have this Court conclude.

2. Disputed Issues Of Fact Regarding Defendants' Conduct Preclude Summary Determination of The Reasonableness Prong of Qualified Immunity

In order to grant qualified immunity to defendants, the court must be able to rule, on undisputed facts, that a reasonable officer could have believed that defendants' conduct was lawful. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871 (9th Cir. 1993). Such a finding should be rare if the court has already determined that the law at issue was clearly established. As the Supreme Court has held, "if the law was clearly established, the immunity defense

ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow v. Fitzgerald*, *supra*, 457 U.S. at 818-19, 102 S.Ct. at 2738.

The Ninth Circuit has recognized that the objective reasonableness prong of the qualified immunity inquiry may be resolved at summary judgment stage if the underlying facts are undisputed. *See Act Up!/Portland*, *supra*, at 872-73. However, the Court of Appeals also recognized that "the determination of what conduct underlies the alleged violation – what the officer and claimant did or failed to do – is a determination of fact." *Id.* at 873. Thus, if those facts are disputed, the objective reasonableness determination simply cannot be made on a motion for summary judgment. *Id.*

a. Defendants Conn and Najera

Defendants Conn and Najera's argument with regard to the reasonableness prong of qualified immunity appears to be twofold: First, the defendants' conduct was inherently reasonable to the extent they were in the grand jury room while the actual unconstitutional conduct was taking place. Second, their conduct was also reasonable because Ms. Baker asserted her fifth amendment privilege against self-incrimination in response to questions posed before the grand jury. Defendants' arguments miss the point. The only issue is whether plaintiff was denied access to his client because of the defendants' conduct and whether that conduct was reasonable under the circumstances. As demonstrated below, defendants Conn and Najera did, in fact, unreasonably interfere with and

caused others to interfere with Mr. Gabbert's right to advise Ms. Baker.

At the outset, plaintiff readily concedes that he was not entitled to accompany Ms. Baker into the grand jury room. No lawyer with even a basic understanding of criminal law would contend otherwise. What plaintiff Gabbert did have a right and obligation to do, as her lawyer, was be available to Ms. Baker should she seek his counsel, before, during and after her testimony. *See Ex. 2, Baker Depo.* at pp. 52-53, 57. Indeed, the defendants obviously understood plaintiff Gabbert to be present with Ms. Baker on the morning of March 21 for precisely that purpose – why else would they have allowed Ms. Baker to leave the grand jury room to attempt to consult with plaintiff. As defendant Najera acknowledged at her deposition, plaintiff Gabbert was at the courthouse for a single purpose – to represent Ms. Baker while she was to be testifying before the grand jury. *See Ex. 4, Najera Depo.* at p.86. Defendant Najera also understood that Ms. Baker had a right to leave the grand jury room during questioning to consult with plaintiff. *See Ex. 4, Najera Depo.* at pp. 109-110. Furthermore, these defendants were otherwise well aware of plaintiff Gabbert's role prior to causing the search to the extent they had earlier engaged in discussions with Mr. Gabbert regarding a possible grant of immunity for Ms. Baker. *See Ex. 3, Conn Depo.* at pp. 67, 70.

More significantly, Conn and Najera were also well aware that the search of plaintiff Gabbert would plainly interfere with his representation of Ms. Baker insofar as they 1) caused the issuance of the warrant, 2) caused Ms. Baker to be called into the grand jury room, and 3)

controlled the timing of both events. *See* Ex. 3, Conn Depo. at pp. 80, 82, 87-88 and Ex. 4, Najera Depo. at pp. 112-113. Indeed, defendant Conn has admitted that he caused the search warrant for Paul Gabbert to be executed shortly before Ms. Baker was to appear before the grand jury. *See* Ex. 3, Conn depo at pp. 87-88. That the timing of the search was strategically orchestrated to interfere with Mr. Gabbert's representation of his client becomes starkly apparent by the following testimony of defendant Conn:

-But I also knew by this point [referring to the meeting with Gabbert and Baker in his office on Monday morning before Baker testified] that we would be getting a search warrant. And once we had the warrant, there might be a change of strategy on his [Gabbert's] part.

See Ex. 3, Conn Depo. at p.75. Patently, any claim by defendants Conn and Najera that they did not plan, control or direct the search is absurd.

Defendants also contend that they objectively believed Ms. Baker was able to consult with plaintiff when she left the grand jury room because she, in fact, asserted her rights under the fifth amendment. However, whether or not these defendants held such a belief has absolutely nothing to do with the reasonableness of their conduct vis-a-vis plaintiff. These defendants had already engaged in conduct, and caused others (*i.e.*, Zoeller and Oppenheim) to engage in conduct, which was violative of plaintiff's fourteenth amendment right. Their subsequent, and mistaken, belief that perhaps no violation occurred - that they may have failed in their effort to separate plaintiff and his client - is hardly a basis for asserting that

their prior conduct was reasonable. Moreover, despite the defendants' erroneous belief that their constitutional foul caused no constitutional harm, it, in fact, did, as several witnesses have testified.

At the outset, as Ms. Baker advised both defendant Conn and Najera while she was in the grand jury room, she was unable to consult with plaintiff just prior to entering the grand jury room because he was taken to another room by the special master. *See* Exhibit 9, Grand Jury Transcript of Traci Baker at p.199; *see* also Ex. 2, Baker Depo. at p.40. More significantly, plaintiff Gabbert knew Ms. Baker needed to consult with him, but he could not speak with her before she was ordered into the grand jury room. *See* Ex. 1, Gabbert Depo. at p.25. Furthermore, when in response to the first question posed to her by Ms. Najera before the grand jury, Ms. Baker asked to confer with her counsel, but was prevented from doing so because plaintiff Gabbert was detained in a separate room where defendant Oppenheim was conducting the search. *See* Ex. 2, Baker Depo. at p.42. Ms. Baker, plaintiff Gabbert and defendant Conn's assistant, Patti Jo Fairbanks, have all testified that Ms. Fairbanks attempted to locate Mr. Gabbert for Ms. Baker. *See* Ex. 1, Gabbert Depo. at p.16; Ex. 2, Baker Depo. at pp. 42-46; and Exhibit 7, Excerpt of Deposition Transcript of Patti Jo Fairbanks at pp. 169-170. However, plaintiff was not able to consult with, or advise, Ms. Baker because he was still being searched by defendant Oppenheim. *See* Ex. 1, Gabbert Depo. at p.16; Ex. 2, Baker Depo. at pp. 42, 46. Ms. Baker was then ordered to return to the grand jury room. *See* Ex. 2, Baker Depo. at p.47.

It is true that, despite the fact that plaintiff Gabbert was not able to consult with her, Ms. Baker did return to the grand jury room and assert her rights under the fifth amendment. However, Ms. Baker did so not knowing what else to do. She assumed it was the most appropriate course to take under the circumstances, based solely on the "body language" of plaintiff Gabbert which she attempted to view through a partially obstructed door. See Ex. 2, Baker Depo. at pp. 45-47. Contrary to any understanding the defendants might have had, Ms. Baker's invocation of the fifth amendment was not based on the counsel of her attorney. In reality, Ms. Baker was reading from a card she had brought with her to rely on, if her attorney did advise her to assert the fifth amendment. See Ex. 2, Baker Depo. at pp. 48, 54. Ms. Baker had the written invocation with her because she was so nervous about appearing before the grand jury. *Id.*

In response to a second question by Ms. Najera, Ms. Baker again asked to confer with Mr. Gabbert. Again, plaintiff Gabbert was unable to advise his client because he was being searched. As Ms. Baker stated at her deposition:

And I came out [of the grand jury room] and proceeded to wait for what I perceived as a considerable amount of time, although it probably wasn't, in fact. I don't know. I was super, super, super nervous, real upset because I wasn't able to see Paul. I didn't know, in fact, whether I should have asserted the Fifth Amendment on the first question, and I was waiting, again. And I don't know if you've ever had to testify before the grand jury, but making 50 people, or however many people, wait for

you, constantly going out of the room made me even more upset. I was real upset waiting, and it seemed like an eternity. I recall the bailiff was there with me. And at that point - at some point, I was directed to go back into the room, that they could not wait any longer, that I had to go back into the room. And I said I needed to talk to my attorney. And I don't know if they said, "Too bad," but they said, "I'm sorry, ma'am, you have to go in." I don't know who said that to me.

See Ex. 2, Baker Depo. at pp. 49-50. And once again, having been denied direction from her counsel, Ms. Baker asserted her fifth amendment right, now knowing what else to do. *Id.* at p.50.

To escape liability, these defendants are now claiming that since they placed themselves in the grand jury room after setting in motion the course of events that deprived plaintiff of his constitutionally mandated right of access to his client, that the resulting damage somehow has no legal significance. The defendants' claim should be rejected by this Court, as should any claim that their conduct in this case was reasonable.

b. Defendants Zoeller and Oppenheim

Defendants Zoeller and Oppenheim claim their conduct was objectively reasonable based, again, on the validity of the search warrant. However, as discussed above, while the validity of the warrant might provide immunity from certain subsequent fourth amendment claims, it would not provide a basis for a reasonable officer to believe that the warrant could be executed in a manner

specifically designed to prevent an attorney from representing his client. Moreover, Zoeller and Oppenheim cannot claim, as they attempt to do, that they "reasonably relied" on the judgment of district attorneys Conn and Najera. Reliance on counsel is clearly not a valid basis for asserting objective reasonableness. *Melton v. City of Oklahoma City*, 879 F.2d 706 (10th Cir. 1989), cert. denied, 112 S.Ct. 296 (1991). As the Melton court held, "adopting the proffered position would immunize officials from liability via the simple expedient of consulting counsel." *Id.* at 731. Thus, where, as here, "the law is clearly established, there is no justification for excusing individuals from liability for their actions." *Id.*

A reliance on counsel defense is especially inappropriate here given the particular facts of this case. First, as an attorney with over sixty years of experience and who has acted as a special master for approximately ten years, defendant Oppenheim should be charged with at least a basic knowledge of due process rights. See Exhibit 6, Excerpt of Deposition Transcript of Elliot Oppenheim at pp. 159-161. Second, defendant Zoeller was well aware that plaintiff Gabbert was at the courthouse on March 21 for the purpose of representing Ms. Baker. See Ex. 5, Zoeller Depo. at pp. 137-138, 142-143. Defendant Zoeller was, of course, also well aware when he served the search warrant that Ms. Baker was about to testify before the grand jury since he served her with the grand jury subpoena. *Id.* Given this backdrop, these defendants should not be permitted to shield themselves with what amounts to a claim of vicarious immunity.

D. PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF

In *City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S.Ct. 1660, 1670 75 L.Ed.2d. 675 (1983), the Supreme Court held that injunctive relief is available where there is "a sufficient likelihood that [the plaintiff] will again be wronged in a similar way." Here, it is entirely likely that plaintiff will "again be wronged in a similar way."

To begin with, Mr. Gabbert continues to represent Ms. Baker. He has been given no indication that the investigation of his client has terminated. See Declaration of Paul L. Gabbert. Indeed, defendant Najera stated in her deposition that despite three search warrants and one grand jury subpoena, the District Attorneys' office still had not obtained the document they sought. See Ex. 4, Najera Depo. at p.124. Presumably, defendants Conn and Najera, who are in charge of the ongoing retrial of Lyle Menendez, still seek to discover the evidence they previously tried to obtain from Ms. Baker. See Ex. 4, Najera Depo. at p.111. Moreover, the defendants apparently believe Mr. Gabbert may be in possession of this evidence. See Ex. 5, Zoeller Depo. at p.140. Furthermore, plaintiff anticipates that Ms. Baker will again be a witness at Mr. Menendez' trial. Given this situation, it is significantly likely that the identical scenario could repeat itself - that the defendants will again attempt to seize materials from plaintiff while he is actively engaged in representing Ms. Baker in an adversarial proceeding. Therefore, plaintiff is entitled to the injunctive relief he seeks.

IV
CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court deny, in their entirety, the defendants' motions for summary judgment.

DATED: September 18, 1995

Respectfully submitted,
MICHAEL J. LIGHTFOOT
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT,
VANDEVELDE WOHRLE
& SADOWSKY

/s/ Melissa N. Widdifield
By: MELISSA N. WIDDIFIELD
Attorneys for Plaintiff
Paul L. Gabbert

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, at Talcott, Lightfoot, Vandeveld, Woehrle & Sadowsky, 655 South Hope Street, 13th Floor, Los Angeles, CA 90017. I am over the age of 18 and not a party to the within action.

On September 18, 1995, I served the foregoing document described as PLAINTIFF GABBERT'S CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS

FOR SUMMARY JUDGMENT on the plaintiff in this action by placing the true copies thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

Executed on September 18, 1995, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Irene Duarte
By: IRENE DUARTE

ATTACHMENT

KEVIN C. BRAZILE
PRINCIPAL DEPUTY COUNTY COUNSEL
648 KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET
LOS ANGELES, CA 90012-2713

SCOTT D. MAC LATCHIE
FRANSELL, STRICKLAND, ROBERTS & LAWRENCE
225 SOUTH LAKE AVENUE, PENTHOUSE
PASADENA, CA 91101-3005

MICHAEL J. LIGHTFOOT
 MELISSA N. WIDDIFIELD
 TALCOTT, LIGHTFOOT, VANDEVELDE
 WOHRLE & SADOWSKY
 655 SOUTH HOPE STREET, 13TH FLOOR
 LOS ANGELES, CALIFORNIA 90017
 (213) 622-4750

Attorneys for Plaintiff
 Paul L. Gabbert

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227-
	)	RSWL(Ex)
Plaintiff,)	
	)	DECLARATIONS IN
vs.	)	SUPPORT OF PLAINTIFF
	)	GABBERT'S
DAVID CONN, CAROL	)	CONSOLIDATED
NAJERA, ELLIOT	)	OPPOSITION TO
OPPENHEIM, AND	)	DEFENDANTS' MOTIONS
LESLIE ZOELLER,	)	FOR SUMMARY
Defendants.	)	JUDGMENT
)	
	)	Date: October 2, 1995
	)	Time: 9:00 a.m.
	)	Place: Courtroom 21
)	
)	

Plaintiff Paul L. Gabbert hereby submits the following declarations in support of his Consolidated Opposition to Defendants' Motions for Summary Judgment.

DATED: September 18, 1995

Respectfully submitted,

MICHAEL J. LIGHTFOOT
 MELISSA N. WIDDIFIELD
 TALCOTT, LIGHTFOOT,
 VANDEVELDE
 WOHRLE & SADOWSKY

/s/ Melissa N. Widdifield
 By: MELISSA N. WIDDIFIELD
 Attorneys for Plaintiff
 Paul L. Gabbert

DECLARATION OF MELISSA N. WIDDIFIELD

1, MELISSA N. WIDDIFIELD, declare as follows:

1. I am an attorney licensed to practice before all courts in the State of California. I am an attorney with the law firm of Talcott, Lightfoot, Vandeveld, Woehrle & Sadowsky and am one of the counsel of record of Paul L. Gabbert in *Gabbert v. Conn, et al.*, No. CV 94-4227-RSWL(Ex).

2. I make this declaration based on personal knowledge and could competently testify to the matters set forth herein if called to do so.

3. On September 7, 1995, I had a discussion with counsel for defendant Elliot Oppenheim, Scott D. MacLatchie. During that discussion, Mr. MacLatchie advised me that it had been determined by the City of Beverly Hills that defendant Oppenheim was to be deemed an employee of the Beverly Hills Police Department for the purposes of this litigation.

4. The following exhibits submitted in support of plaintiff Gabbert's Opposition to Defendants' Motions for Summary Judgment are filed concurrently herewith:

a. Exhibit 1 is a true and correct copy of an excerpt of the deposition of Paul L. Gabbert, taken on April 4, 1995.

b. Exhibit 2 is a true and correct copy of an excerpt of the deposition of Traci L. Baker, taken on May 4, 1995.

c. Exhibit 3 is a true and correct copy of an excerpt of the deposition of David P. Conn, taken on August 4, 1995.

d. Exhibit 4 is a true and correct copy of an excerpt of the deposition of Carol Najera, taken on August 3, 1995.

e. Exhibit 5 is a true and correct copy of an excerpt of the deposition of Leslie Zoeller, taken on August 1, 1995.

f. Exhibit 6 is a true and correct copy of an excerpt of the deposition of Elliot Oppenheim, taken on June 30, 1995.

g. Exhibit 7 is a true and correct copy of an excerpt of the deposition of Patti Jo Fairbanks, taken on August 10, 1995.

h. Exhibit 8 is a true and correct copy of this Court's Order on Defendant Conn and Najera's Motion to Dismiss, dated September 30, 1995.

i. Exhibit 9 is a true and correct copy of the transcript of testimony of Traci L. Baker before the Los Angeles County Grand Jury on March 21, 1994.

j. Exhibit 10 is a true and correct copy of the Superior Court transcript of the hearing on plaintiff Gabbert's Motion for Disclosure of Grand Jury Transcripts before the Honorable J. Stephen Czuleger, dated May 19, 1995.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 18th day of September, 1995 at Los Angeles, California.

Melissa N. Widdifield
MELISSA N. WIDDIFIELD

DECLARATION OF PAUL L. GABBERT

PAUL L. GABBERT, being first duly sworn, declares:

1. That I am an attorney at law licensed to practice before all the Courts of the State of California. I make this declaration in opposition to defendants, motions for summary judgment. If called as a witness I could and would testify to the following facts based on my personal knowledge except as to those allegations made by me based on information and belief, and I believe those allegations to be true.

2. I represent Traci Baker as a potential witness in the case of *People v. Lyle Menendez*. I also represented her

in connection with a criminal investigation conducted by the Los Angeles County Grand Jury. In that matter, Ms. Baker was the target of a perjury investigation arising out of her testimony on behalf of the defense during the first *Menendez* trial. To my knowledge, the Grand Jury investigation arising out of the first *Menendez* trial has never been terminated.

3. The *Menendez* retrial is ongoing and is in the jury selection phase. To the best of my knowledge, Ms. Baker remains a potential witness on behalf of the prosecution in the *Menendez* retrial.

4. Based on the deposition testimony of Deputy District Attorney Najera in *Gabbert v. Conn, et al.*, No. CV 94-4227-RSWL, I am informed, believe and based thereon allege that the *Menendez* retrial prosecution team never obtained all of the evidence previously sought by them, specifically the complete original letter purportedly written from Lyle Menendez to Traci Baker. I believe, given the previous execution and compulsion of search warrants for Ms. Baker's home, Ms. Baker's person, my person, my briefcase and my office, that the District Attorney's office will continue its efforts to obtain the letter at issue.

5. If Ms. Baker is subpoenaed to testify or produce documents for any pending or future Grand or Petite Jury, I will represent her at that proceeding.

6. Given the past conduct of Deputy District Attorneys Conn and Najera, I am concerned that they will again attempt to interfere with my attorney-client relationship with Ms. Baker, as well as other future clients

who are similarly situated, thereby denying me my constitutional right to represent my clients and practice my profession.

I declare under penalty of perjury that the foregoing is true and correct, except as to those allegations made by me based on defendant Najera's deposition testimony, and I believe those allegations to be true.

Executed this 15th day of September, 1995, at Santa Monica, California.

/s/ Paul L. Gabbert
PAUL L. GABBERT, Declarant

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California, at Talcott, Lightfoot, Vandeveld, Woehrle & Sadowsky, 655 South Hope Street, 13th Floor, Los Angeles, CA 90017. I am over the age of 18 and not a party to the within action.

On September 18, 1995, I served the foregoing document described as DECLARATIONS IN SUPPORT OF PLAINTIFF GABBERT'S CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT on the plaintiff in this action by placing the true copies thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service and the fact that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

Executed on September 18, 1995, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Irene Duarte
By: IRENE DUARTE

ATTACHMENT

KEVIN C. BRAZILE
PRINCIPAL DEPUTY COUNTY COUNSEL
648 KENNETH HAHN HALL OF ADMINISTRATION
500 WEST TEMPLE STREET
LOS ANGELES, CA 90012-2713

SCOTT D. MAC LATCHIE
FRANSCCELL, STRICKLAND, ROBERTS & LAWRENCE
225 SOUTH LAKE AVENUE, PENTHOUSE
PASADENA, CA 91101-3005

MICHAEL J. LIGHTFOOT
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT, VANDEVELDE
WOEHRLE & SADOWSKY
655 SOUTH HOPE STREET, 13TH FLOOR
LOS ANGELES, CALIFORNIA 90017
(213) 622-4750

Attorneys for Plaintiff
Paul L. Gabbert

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,	)	CASE NO. CV 94-4227-
Plaintiff,	)	RSWL(Ex)
v.	)	EXHIBITS IN SUPPORT
DAVID CONN, CAROL	)	OF PLAINTIFF
NAJERA, ELLIOT	)	GABBERT'S
OPPENHEIM, AND	)	CONSOLIDATED
LESLIE ZOELLER,	)	OPPOSITION TO
Defendants.	)	DEFENDANTS' MOTIONS
	)	FOR SUMMARY
	)	JUDGMENT
	)	Date: October 2, 1995
	)	Time: 9:00 a.m.
	)	Place: Courtroom 21

Plaintiff Paul L. Gabbert hereby submits the following exhibits in support of his Consolidated Opposition to Defendants' Motions for Summary Judgment.

DATED: September 18, 1995

Respectfully submitted,

MICHAEL J. LIGHTFOOT
MELISSA N. WIDDIFIELD
TALCOTT, LIGHTFOOT,
VANDEVELDE WOEHRLE &
SADOWSKY

/s/ Melissa N. Widdifield
By: MELISSA N. WIDDIFIELD
Attorneys for Plaintiff
Paul L. Gabbert

EXHIBIT 1

United States District Court
Central District of California

PAUL L. GABBERT,

Plaintiffs,

vs.

DAVID CONN, CAROL NAJERA,
ELLIOT OPPENHEIM, LESLIE
ZOELLER and DOES I through X,

Defendants.

No. CV944227
RSWL (Ex)

DEPOSITION OF PAUL L. GABBERT

Tuesday, April 4, 1995

ORIGINAL

[p. 2] UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,

Plaintiff,

vs.

DAVID CONN, CAROL NAJERA,
ELLIOT OPPENHEIM, LESLIE
ZOELLER and DOES 1 through X,

Defendants.

No. CV 94-4227
RSWL (Ex)

Deposition of PAUL L. GABBERT, taken on behalf of
Defendants, at 648 Kenneth Hahn Hall of Administration,
500 West Temple Street, Los Angeles, California 90012,
commencing at 1:10 P.M. on Tuesday, the 4th day of April,
1995, before ELIZABETH A. HINES, CSR No. 9236, pur-
suant to Notice.

Reported by: ELIZABETH A. HINES, CSR No. 9236

Job No.: 95-0404EAH

[p. 3] APPEARANCES

For Plaintiff:

TALCOTT, LIGHTFOOT, VANDEVELDE,
WOEHRLE & SADOWSKY
BY: MICHAEL J. LIGHTFOOT ESQ.
655 South Hope Street
Thirteenth Floor
Los Angeles, California 90017

For Defendants David Conn and Carol Najera:

DE WITT W. CLINTON, COUNTY COUNSEL
BY: KEVIN C. BRAZILE
PRINCIPAL DEPUTY COUNTY COUNSEL
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, California 90012

For Defendants Elliot Oppenheim and Leslie Zoeller:

FRANSCCELL, STRICKLAND, ROBERTS &
LAWRENCE
BY: SPENCER C. KRIEGER, ESQ.
225 South Lake Avenue
Penthouse
Pasadena, California 91101

* * *

[p. 36] A. Well, I knew the 13th floor, and I think I have been in the grand jury sort of entryway although I can't recall when. I did not – I was not familiar with the layout of the various rooms. It wasn't familiar to me on March 21, 1994. I think I have been in there before. I don't remember when and it wasn't familiar to me.

Q. When a witness is going to testify before the grand jury, they have to check in with the bailiff; is that correct?

A. Yes. Correct.

Q. What time did Ms. Baker check in with the bailiff?

A. I think we actually checked in before her appointed time, which was either 8:00, 8:30, believe. I think we checked in probably around 8:25, if I'm correct that it was 8:30.

Q. Did she check in with the bailiff?

A. I think I checked in for her. I don't recall whether she was by my side or in the hall at the time I checked her in.

Q. Who was present when you checked her in?

A. Either myself and the bailiff or myself, the bailiff and Ms. Baker.

Q. Anyone else?

A. There may have been other clerical personnel [p. 37] behind the counter, but I don't remember anybody in the immediate vicinity of the bailiff's desk.

Q. Where was the bailiff's desk located in relation to the grand jury hearing room?

A. It's in an anteroom or a waiting room area. It has a little desk.

Q. And when you checked in with the bailiff, did he have to check Ms. Baker's name off of a list of some kind?

A. Probably. I don't recall.

Q. Okay.

A. He seemed – my recollection is that it registered.

Q. Did he mark it down on a piece of paper, log it in in some way?

A. He may have. I think so. I don't remember.

Q. What happened after you checked her in?

A. We went outside to wait in the hallway.

Q. And what happened after you went outside into the hallway?

A. Sometime after we were waiting outside, sitting on a bench, Ms. - I believe Mr. Conn and Ms. Najera showed up.

Q. Then what happened?

A. I think we said, "Good morning" ~~where~~ [or /s/ PLG] there

* * *

[p. 45] Amendment privilege against self-incrimination. We'd deal with it then.

Q. Did he make that statement during the phone conversation on March 21?

A. He made the comment during the phone conversation prior to March 17.

Q. Do you recall anything else the two of you discussed between you in that phone conversation where the issue of immunity was raised?

A. At one point - at one point he said something like, "We ~~had~~ [have /s/ PLG] bigger fish to fry than Ms. Baker."

Q. Did he say anything else that you can remember?

A. Not that I can remember at this time.

Q. So then on March 21st, the issue of immunity was raised again; correct?

A. Well, the answer to the question [is /s/ PLG], yes, ~~but~~ [and so /s/ PLG] because he used the term "use

immunity" - ~~and~~ [but /s/ PLG] he [had /s/ PLG] never used that term before.

Q. Who was present when he raised the issue of use immunity?

A. Ms. Baker, myself, Mr. Conn and, if Ms. Najera was there that original time when she came down again, she was present. I don't remember if she was present.

Q. To the best of your knowledge, did Ms. Baker [p. 46] overhear him when he had raised the subject of use immunity?

A. I don't know. There wasn't a big discussion. What happened was he said, "Let's go up to my office and talk about it."

So the topic was sort of broached. It was the first I heard of it. He invited us up to his office to discuss it, and we went up to his office to discuss it.

Q. Did Ms. Baker go with you?

A. Yes.

Q. On the way up to his office to discuss it, was - I believe this was on the 18th or 19th floor?

A. They were on the 18th floor, sir.

Q. Did Ms. Baker say anything?

A. Not to my knowledge.

Q. Did she react in any way to his - to the issue of use immunity?

MR. LIGHTFOOT: Are you asking did she react to him?

Q. BY MR. BRAZILE: In the presence of Mr. Conn when he made the statement, did she react in any way to his comment about use immunity?

A. I don't think so. I don't think she knew what it meant.

Q. Did she ask you any questions in the presence of Mr. Conn regarding immunity? This was before you get up [p. 47] to his office.

A. I understand the time period, Counsel.

The answer is: I don't know. She may have said, "What are we doing?"

Q. Did the two of you have any conversations on the way up to Mr. Conn's office while you were in the elevator?

A. I don't think so.

Q. So you get to the 18th floor; correct?

A. Yes.

Q. And do all of you go into Mr. Conn's office?

A. Yes.

Q. Who else was in Mr. Conn's office?

A. Some people walked in and out, but I think it was just the three of us.

Q. What's the first thing that was said when you got into Mr. Conn's office?

A. I don't remember.

MR. LIGHTFOOT: I'm assuming "the three" is the client, Mr. Gabbert and Mr. Conn?

MR. BRAZILE: Exactly.

Q. Is that what you understood the question to mean?

A. Yes.

Q. What was discussed in Mr. Conn's office?

[p. 48] A. What was discussed was a grant of use immunity by the District Attorney's office in the form of a letter in return for Ms. Baker's testimony before the grand jury. And the question of whether this would be - first of all, I said, "there is no such thing as use immunity in the state system. And there was some discussion.

And, I said, "If the DA says that ~~we are~~ [he is /s/ PLG] not going to use it, what about fruits?"

And he said, "[we /s/ PLG] would be free to use fruits or any other independent evidence against her."

I said - and this is not necessarily sequential - I said, "This is the first I have heard about this. I'll have to think about it. I need to discuss it with my client."

Q. Was she present?

A. Yes.

Q. When you had this discussion -

A. Yes.

Q. - about the use immunity?

A. Yes. And he said he would have his secretary prepare a draft of a letter.

Q. On use immunity?

A. Yes.

And we said we would go talk and think about it, and we left and went back to the 13th floor.

[p. 49] Q. So he didn't commit himself to giving the use immunity? It was kind of negotiations at that time?

A. He committed himself to writing a letter and presenting it to me in a formal offer, but it wasn't really - it was up to me on behalf of Ms. Baker to accept it or not.

And I told him - I believe I told him that my inclination was not to accept it.

Q. Did he say that he would draft the letter anyway?

A. Yes.

Q. How long did this meeting last between you, Mr. Conn and Ms. - your client, Ms. Baker?

A. Five minutes.

Q. What happened after the meeting?

A. Ms. Baker and I left, took the elevator down to the 13th floor.

Q. What time did you get back to the 13th floor after the meeting with Mr. Conn?

A. I recall it was still in the morning.

Q. Give me your best estimate. Before 10:00 or after 10:00?

A. I think it was around 10:00 because, as I recall, he didn't show up for the grand jury until after 9:00, even though the subpoena was for 8:30 is my [p. 50] recollection. I mean the subpoena says what it says, but he might not have shown up until 9:30. I think it's probably close to 10:00. Between 9 - I think it's between 9:30 and 10:00, but I could be off.

Q. When the two of you get back to the 13th floor, where do you go, you and Ms. Baker?

A. We stood around by the grand jury.

Q. For how long?

A. Until - until Mr. Conn, Ms. Najera and, I think, some other people came back down.

Q. What time was that?

A. I don't recall.

Q. Give me your best estimate.

A. It's around - I think it was probably about - I don't know - 15 minutes later.

Q. Before 10:30 or after 10:30?

A. I think it was before 10:30.

Q. What happens when these other individuals come back?

A. Conn came down. I think Najera came down, and I think, I'm not sure, if Oppenheim - and I didn't

know who Oppenheim was, but this fellow dressed in blue. Conn's secretary, I think, came down.

Conn came up to me, and I said - I don't know everything that was said, but the question by me was:

[p. 51] "Where's the letter?"

Q. What did he say?

A. "It's still being typed up."

Q. What else was discussed?

A. That's all I remember.

Q. You don't recall him saying anything else at that point?

A. No. [Yes. He talked about why he thought she was guilty. /s/ PLG]

Q. Did you say anything else to anyone at that point in time?

A. I might have looked at Ms. Baker and shrugged.

Q. What happened next?

A. I think Mr. Conn went in through the outer doors to the grand jury. I think Ms. Najera followed. If the other two people - the secretary and Oppenheim - came down, they went through the doors. I think either Ms. Baker and I followed or somebody came out and said - called Ms. Baker before the grand jury.

Ms. Baker needed to go to the bathroom and stated that. She then went to the bathroom, and if we were inside the grand jury anteroom or waiting room, we walked outside so she could go to the bathroom.

I was standing in the hall. Ms. Najera came out, stood in the hall with me and attempted to make some small talk with me.

[p. 52] Q. All right. Now, where was Ms. Baker at this point in time?

A. I presume in the ladies room.

Q. All right. Then what happened?

A. Ms. Baker returned from the ladies room. Ms. Najera, Ms. Baker and I went into the anteroom of the grand jury. And while we were standing there, Detective Zoeller came up and said, "Good morning, Mr. Gabbert."

Q. Where was Ms. Baker when Detective Zoeller came in and said good morning to you?

A. I believe she was standing adjacent to me.

Q. And where was your briefcase and your accordion file at that time?

A. I don't remember whether I was holding them or whether I had set them down on a conference table or a table in the anteroom.

Q. Now, this anteroom that you have testified to, is that also known as the witness room that was adjacent to the grand jury room?

A. I don't remember the name of it. It may have been the witness room.

Q. Was it the room where the bailiff was stationed?

A. Yes.

Q. What happened next?

[p. 53] A. I said, "Good morning, Detective Zoeller."

Q. Was the bailiff in that room at that time?

A. I don't remember. His desk was there. He was there most of the time. He may have been -

Q. What happens next?

A. Detective Zoeller then presented me with a search warrant, served a search warrant on me for my briefcase my person and Ms. Baker's person.

Q. What happens next?

A. I don't know if this is a precise chronology, but within seconds Ms. Baker was called before the grand jury.

Q. Who called her before the grand jury?

A. I don't know whether it was the foreperson or Mr. Conn. I was introduced to Mr. Oppenheim, who was the special master.

I said, "We'll need a private room." First I read the warrant. I was a little surprised. I was quite surprised and -

Q. Were you angry?

A. Absolutely.

When I said, "We'll need a private room," someone said, "We have one."

Q. Do you know who that was, who said, "We have one"?

* * *

[p. 56] Q. What happens once you get into this office room?

A. I told Mr. Oppenheim, among other things, that the only thing that I had in my possession, meaning on my person or in my briefcase, that was responsive to the search warrant, was two photocopied pages - I believe it was two pages of a letter that was supposedly three pages in length that was purportedly written from Lyle Menendez to Tracy Baker. And that the prosecution already had that letter. Mr. Oppenheim kept taking the search warrant and reading it. He must have read the search warrant on numerous occasions. He then said - directed me to permit him to search my briefcase.

Q. What did you say?

A. I produced this letter. I told him that, "This was all there was. Did he still want to search?"

He said, "Yeah."

So I started - I told him that I had privileged documents, files, pertaining to Ms. Baker and other clients.

Q. In the briefcase or the accordion file?

A. I had two files pertaining to other clients in the briefcase. I had Ms. Baker's file in the accordion file. As I stated previously, I may have had one of Ms. Baker's files in the briefcase. I can't recall if it [p. 57] was in the briefcase or the accordion.

He directed me, "Go ahead, I want to search even though notwithstanding what you said."

I then started to take items out of my briefcase. Sometime while this was happening, I was told that my client wanted to speak to me.

Q. Who told you that?

A. I believe it was Mr. Conn's secretary, the lady in pink. And there was, like, a knock on the door, and then the door opened, and she said this to me.

And I said, words to the effect, "I can't talk to Ms. Baker now. It will have to wait. I'm being searched."

Q. Did she tell you where Ms. Baker was?

A. She said - I don't know that she said it, but it was clear that Ms. Baker had to be outside of the grand jury because I couldn't talk to her in the grand jury. So by implication, it was clear to me that she wasn't in the grand jury, but I don't remember the woman stating where she was.

Q. Did the secretary ever say to you that Ms. Baker had ever gone before the grand jury while you were being searched?

A. No.

Q. Do you know whether or not she was before the

* * *

[p. 64] did it end, your best estimate?

A. The only thing I can tell you, I think it's between 10:00 and 11:15. I'm going to bracket that way because I wasn't looking at my watch.

Q. Were you wearing a watch that day?

A. Yes, absolutely.

Q. You think the search between you and Mr. Oppenheim ended sometime between 10:00 and 11:15; is that your best estimate?

A. Right.

Q. Now, when Mr. Conn's secretary comes in the door -

A. Knocks on the door of the office space where I am with Mr. Oppenheim.

Q. - does she ever say or make any reference to the fact that Ms. Baker is before the grand jury testifying?

A. She said, "Your client wants to talk to you."

And I said, "I can't talk to her right now," words to that effect. "I'm being searched."

And she says, "She has to talk to you right now." She either says, "Because she has to go back in the grand jury," or this was clear in the context that it was most urgent.

And I said, in effect, "That's tough. They [p. 65] created this situation. They can wait as long as it takes."

Q. So is it your testimony that Mr. Conn's secretary said to you that Ms. Baker was testifying before the grand jury?

MR. LIGHTFOOT: I'm going to object to that. Mischaracterizes what Mr. Gabbert said.

MR. BRAZILE: That's why I'm asking the question, Counsel. Is he saying it or is he not saying she said that? He can either say "yes" -

MR. LIGHTFOOT: Well, he said exactly what he thinks the secretary said to him when she knocked on the door. He's answered that question a number of times.

MR. BRAZILE: My follow-up question is this: I want to know, did he hear her say the words that his client, Ms. Baker, was testifying before the grand jury or had testified before the grand jury, anything along those lines?

THE WITNESS: Well, except for the fact that it's compound.

MR. BRAZILE: Well, let's make the record clear.

Q. First question, did Mr. Conn's secretary tell you, when she came into that room when you were being searched, that your client was testifying before the grand jury?

[p. 66] MR. LIGHTFOOT: In those words?

THE WITNESS: In those exact words?

Q. BY MR. BRAZILE: In those exact words.

A. I don't recall. I believe she may have said words to the effect that "she's wanted before the grand jury."

Q. All right. So then she never said to you that your client is testifying before the grand jury?

A. I don't think she said those exact words, no, sir.

Q. All right. Did she ever tell you that your client, Tracy Baker, is about to go testify before the grand jury when she entered that room?

A. Not those exact words.

Q. Now, what words did she use when she entered that room that you can recall?

A. No other words than those to which I have previously testified.

Q. Which words so we have a clear record here.

A. The ones on the record.

Q. I'm asking you to state it again.

A. "Your client wants to talk to you," or, "your client needs to talk to you."

"I can't talk to her now. She will have to wait."

[p. 67] Words to the effect, "it's urgent," or, "she can't wait," or, "she's wanted before the grand jury."

My saying, "that's too bad. They will have to wait. They created this situation. They will wait as long as it takes for me to finish here with the search."

Q. All right. Now, during the search, what materials in your possession did Mr. Oppenheim look through?

MR. LIGHTFOOT: There's a later search. This is the search in the room with Oppenheim we're talking about?

MR. BRAZILE: Correct. The very first search.

THE WITNESS: He looked through everything in my briefcase and in the accordion file.

Q. BY MR. BRAZILE: Did he look at anything else or search through anything else besides your briefcase and the accordion file?

A. Well, there were items in the briefcase -

Q. Right. I understand that.

Other than the briefcase and the accordion file, did he search through anything else?

A. No.

Q. How long did it take him to search through your briefcase?

A. I estimated approximately 20 minutes.

Q. How long did it take him to search through the

* * *

[p. 69] A. During

Q. Okay.

A. What happened was, Mr. Oppenheim took the two pages of the purported three pages, the photocopy, of the letter allegedly written by Lyle Menendez to Tracy Baker with him. And I took my briefcase with its contents including the two files - two other attorney-client files, which he read over my objection that contained privileged information, and my accordion file and went out in the anteroom.

Q. Mr. Oppenheim went out in the anteroom?

A. I went with him. I don't know who left the room, if we both left that room and went out in the anteroom.

Q. The anteroom, that's where the bailiff is located?

A. Right.

Q. What happened after you get out to the anteroom?

A. At some point shortly thereafter, Conn comes up. He says, "Mr. Oppenheim" or "the special master" - I forget how he referred to him - "has determined that none of the items in your briefcase are privileged; therefore, Detective Zoeller is going to search your briefcase as directed by the judge who issued the search warrant" - "by [p. 70] the magistrate that issued the search warrant."

I protested. I asked that it be delayed so that my counsel could appear. I said that, "If he had made a determination that there was nothing privileged in my briefcase, he was incorrect or in error."

And Conn indicated, I believe, with a gesture or with words - I forget which - that the search was going to take place or I could either open the briefcase and show them - that Zoeller was going to go through it himself with Conn, Najera or Zoeller looking on.

I started to repeat the procedure that I had gone through with Oppenheim, and I pulled out the two other files besides Ms. Baker's, the one file that contained the notes of my interviews with her.

And I told Zoeller, "There's nothing in here pertaining to the subject matter of the search warrant."

And Zoeller said, "I believe you. ‡ [and /s/ PLG] didn't look in those two" - Zoeller did not look in those two files, the other files, meaning Baker's accordion file and the file that contained her notes - I went through everything else. I opened it up. And at some point Conn

left and Najera and Zoeller stayed there and looked through and flipped through all of the documents in the Tracy Baker file and the other items in my briefcase except for the other two clients' [p. 71] files.

Q. When you came out of the anteroom or came out of the room with Oppenheim and entered into this anteroom or the waiting room where the bailiff was located, where was Tracy Baker at that time?

A. I don't know if she was there at that point or she came back in at some point. I believe she was present during the second search by Zoeller.

Q. But you are not sure of where she was when you first entered that room with Mr. Oppenheim after his search; correct?

A. I'm sure she was in one of two rooms.

Q. Which two?

A. She was either before the grand jury or she was in the anteroom.

Q. But you don't recall which one?

A. Right.

Q. How long does the second search take place or how long does the second search last?

A. Five minutes.

Q. Okay.

A. Approximately.

Q. And the second search takes place in the anteroom or the bailiff's room?

A. Correct.

* * *

[p. 80] put over to another date for Judge Cooper to rule on my motion to quash the grand jury subpoena, which was now finally before a judge.

Q. What was the ruling?

A. She didn't make one.

Q. Okay.

A. We went back outside. I conferred with my counsel, and I had my - and then Mr. Conn and eventually Mr. Zoeller were informed - they had since gotten a search warrant from my office - that we - pursuant to the compulsion of the warrant, we would make available the items or the item described in the warrant from my office.

And I was told that Zoeller went to my office and my secretary gave him the envelope. And then we went our respective ways.

Q. Okay. Are you aware of the order made by Judge ~~Luke~~ [Lew /s/ PLG] in this case on September 30th, 1994, with regards to the motion to dismiss, filed on behalf of David Conn and Carol Najera?

A. I know there have been various orders in the case, Counsel. I don't know what particular order you are referring to.

Q. On September 30th, 1994, he made an order with regards to a motion to dismiss, filed by defendants Conn and Najera which was granted largely in part. Most of it

* * *

[p. 82] have personal knowledge, no.

Q. BY MR. BRAZILE: So you are just aware of one occasion where she wanted to talk to you and couldn't talk to you because you were being searched; is that correct?

(Whereupon, a discussion was held between the deponent and his counsel out of the hearing of the reporter.)

MR. LIGHTFOOT: Why don't you ask the question again.

MR. BRAZILE: Would you read the question back.

(The requested portion of the record was read by the reporter.)

THE WITNESS: Yes.

Q. BY MR. BRAZILE: Yes, that's correct?

A. Yes.

Q. All right. Are you aware of any occasion where she wanted to talk to you before she went into the grand jury room to testify and she was not allowed to because you were being searched or were made unavailable?

A. Well, I believe she wanted to talk to me when I was being led away to be searched.

Q. Why do you believe that? What did she say, if anything?

A. I don't recall the contents of what she said, but I could tell you by the way she looked that she looked [p.

83] extremely upset and flustered, that she did not want to be left alone with the people that were investigating her for perjury.

Q. Did she ever say to you, as you were being lead [sic], "I have to talk to you. I need to discuss something with you?"

A. She may have. I don't recall.

Q. Do you recall any other occasion before she went in before the grand jury where she made a request to speak with you and she was not allowed to because you were unavailable for some reason?

A. No.

Q. Were there any occasions on March 21st, 1993 (sic) where you were prevented from giving legal advice to your client, Tracy Baker?

MR. LIGHTFOOT: Again calls for speculation on the part of the witness.

MR. BRAZILE: That he's aware of. All my questions are based upon his personal knowledge.

THE WITNESS: Other than I believe you meant 1994.

Q. BY MR. BRAZILE: I said - I'm sorry, 1994.

A. To be responsive to the question, other than the time I was being searched and the secretary said my client wanted to talk to me, no.

Q. Are you claiming any medical expenses as

* * *

[p. 99] Q. Do you remember seeing his secretary after you left the first search?

A. I remember seeing her at some point during that morning in the anteroom, but I don't specifically remember seeing her in the anteroom after the first search.

Q. So you didn't mention during - while you were in the anteroom, you didn't mention to David Conn that your client had wanted to speak to you earlier; is that correct?

A. That's correct.

Q. Is there a reason you didn't mention it to him at that point?

A. Yes. There are several reasons.

First of all, whenever I asked Mr. Conn for anything, the answer was, "No. We don't have to do it your way. We won't wait for your counsel. The search is going to take place now. We don't have to do anything the way you want to." And it was a series of edicts from Mr. Conn.

Also formerly when I had discussed things with Mr. Conn, he had misrepresented to me that he was typing up a use immunity letter or having his secretary do so when the truth is, in fact, they were typing up a search warrant.

So it wasn't exactly on my mind to talk to Mr. Conn about that particular manifestation of his [p. 100] impatience in my ~~mis~~ [/s/ PLG] representation of Ms. Baker, who he was now in the process of taking in front of a duty judge to be held in contempt.

Q. You did not feel it was important to speak to him or even mention the fact that you had not been allowed to speak to your client?

A. I thought lots of things were important, but this was not my first duty of business in that the point it -

Q. You didn't give any kind of insight into the fact that his secretary had mentioned anything to you while you were in the first search?

A. Not to my recollection, sir.

Q. Approximately how far away was David Conn's secretary when she made that statement?

A. I think she was at the door to a secretarial space or an office space. I guess she was about ten feet away.

Q. Did Mr. Oppenheim say anything to David Conn's secretary after she made her statement?

A. Not to my - not to my recollection.

Q. Did he make any kind of expression to the best of your knowledge?

A. Other than Mr. Oppenheim's gratuitous comments about various dress sizes ~~on~~ [in /s/ PLG] my personal calendar, he

* * *

IN WITNESS WHEREOF, I have hereunto subscribed
my name this 2nd day of May, 1995.

[p. 115] STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

That the foregoing transcript is a true and correct transcript of my shorthand notes so taken.

IN WITNESS WHEREOF, I have subscribed my name
this 11th day of April, 1995.

/s/ Elizabeth A. Hines
ELIZABETH A. HINES

EXHIBIT 2

United States District Court
Central District of California

PAUL L. GABBERT,

Plaintiff,

vs.

DAVID CONN, CAROL
NAJERA, ELLIOT OPPENHEIM,
LESLIE ZOELLER, and DOES I
through X, Inclusive,

Defendants.

No. 944227
(RSWL) (Ex)

DEPOSITION OF TRACI L. BAKER

Thursday, May 4, 1995

ORIGINAL

[p. 2] UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PAUL L. GABBERT,

Plaintiff

-vs-

DAVID CONN, CAROL
NAJERA, ELLIOT OPPENHEIM,
LESLIE ZOELLER, and DOES I
THROUGH X, Inclusive,

Defendants.

No. 94 4227
(RSWL) (Ex)

DEPOSITION OF TRACI L. BAKER, taken on behalf
of Defendants, at 500 North Temple Street, Suite 648, Los
Angeles, California, at 2:30 p.m., Thursday, May 4, 1995,
before JENNIE A. ARNOLD, CSR No. 4182, pursuant to
Notice.

Reported by: JENNIE A. ARNOLD, CSR No. 4182

Job No. 95-0504JAA

[p. 3] APPEARANCES

For Plaintiff:

LAW OFFICES OF
TALCOTT, LIGHTFOOT, VANDEVELDE,
WOEHRLE & SADOWSKY
BY: MELISSA N. WIDDIFIELD, ESQ.
13th Floor
655 South Hope Street
Los Angeles, California 90017
(213) 622-4750

For Deponent:

NASATIR, HIRSCH & PODBERESKY
BY: VICKI I. PODBERESKY, ESQ.
2115 Main Street
Santa Monica, California 90405
(310) 399-3259

For Defendants ELLIOT OPPENHEIM and LESLIE ZOELLER:

FRANSCCELL, STRICKLAND, ROBERTS &
LAWRENCE

BY: SCOTT D. MacLATCHIE, ESQ.

225 South Lake Avenue

Penthouse

Pasadena, California 91101-3005

(818) 304-7830

For Defendants DAVID CONN and CAROL NAJERA:

DE WITT W. CLINTON

County Counsel

County of Los Angeles

BY: KEVIN C. BRAZILE, ESQ.

Principal Deputy County Counsel

650 Kenneth Hahn Hall of Administration

500 West Temple Street

Los Angeles, California 90012

(213) 974-1943

* * *

[p. 40] BY MR. BRAZILE:

Q How old is your boyfriend?

MS. PODBERESKY: Objection. Relevance.

THE WITNESS: He's 26.

BY MR. BRAZILE:

Q Do you know his date of birth?

A 6-1-68.

Q On March 21st, 1994, did you have to go and testify before the L. A. County grand jury?

A Yes.

Q Did you go to the L. A. grand jury on March 21, 1994?

A Yes.

Q Did anybody accompany you there?

A Yes.

Q Who?

A Mr. Gabbert.

Q Anyone else go with you?

A No.

Q What time did you arrive at the L. A. County grand jury on March 21, 1994?

A Again, I'm bad with dates, times. Specifically - I mean, not specifically, morning, early.

Q Before nine o'clock or after nine o'clock?

A That I arrived at the building?

[p. 41] Correct.

A Before nine o'clock.

Q When you arrived at the building, did you meet anyone?

A Yes.

Q Who did you meet?

A Mr. Gabbert.

Q Where did you meet him?

A I believe we first met on the 13th floor. I'm not sure. I shouldn't speculate. I don't recall exactly where we met for the first time.

Q Prior to arriving at the grand jury on March 21, 1994, had you received any advice from your attorney, Mr. Gabbert, legal advice?

MS. PODBERESKY: I am going to object. The question calls for attorney-client privileged information, and I instruct my client not to answer.

MR. BRAZILE: Okay, Counsel, just so the record is clear, part of Mr. Gabbert's claim is that he was not given access to his client and that infringed upon his Constitutional right. My question is not as to what the advice was, just whether or not she got any before she went into the grand jury. That's the question. Is that what you're instructing her not to answer?

MS. PODBERESKY: Yes.

[p. 42] MS. PODBERESKY: Let's go off the record a second. (The witness, her counsel, Plaintiff and Plaintiff's counsel leave the room and return shortly thereafter.)

MR. BRAZILE: Back on the record.

MS. PODBERESKY: My objection stands, but I will allow my client to answer.

THE WITNESS: Yes.

BY MR. BRAZILE:

Q Prior to arriving at the grand jury on March 21st, 1994, did you receive any legal advice from Mr. Gabbert regarding your testimony before the grand jury?

MS. PODBERESKY: I am going to object on the attorney-client privilege and the Sixth Amendment and instruct my client not to answer.

BY MR. BRAZILE:

Q How many conversations did you have with your attorney, Paul Gabbert, between March 18, 1994, and the morning of March 21, 1994, prior to giving your grand jury testimony?

A Was March 18 the day I was given the subpoena?

Q That would have been the day of the search, I think.

A Can you repeat the question?

MR. BRAZILE: Can you please read back the last

* * *

[p. 48] legal advice, not what the content of that legal advice was.

BY MR. BRAZILE:

Q How long did you have a discussion about legal advice during that 45-minute period of time?

A For clarification, it may not have been a full 45 minutes. It just did not exceed 45 minutes.

Q I understand.

A Probably a total of five to ten minutes.

Q Did the two of you have any discussions of a non-legal nature during that 45 minutes?

MS. PODBERESKY: I am going to object on the basis of attorney-client privilege and Sixth Amendment and instruct my client not to answer.

BY MR. BRAZILE:

Q What happened after you and Mr. Gabbert were out in the hallway for 45 minutes?

A At some point, I believe Mr. Conn appeared.

Q Did he say anything when he arrived?

A He and Mr. Gabbert spoke.

Q Do you overhear what they were saying to one another?

A Yes. I could have, yes.

Q What did they say?

A Specifically - they spoke, not at length, but I certainly couldn't recount what they said specifically here. [p. 49] They were - I'll stop there.

Q Did you overhear any part of their conversation?

A Yes.

Q What part of their conversation did you overhear?

A The one that stands out most is Mr. Conn and Mr. Gabbert were discussing whether or not Mr. Conn was

granting immunity. Also, Mr. Conn asked if I would surrender to arrest here in Los Angeles, or if they would have to arrest me in Orange County.

Q What else did Mr. Conn say?

A They were discussing issues of that nature regarding immunity and things about me in terms of surrender.

Q What did Mr. Gabbert say when Mr. Conn brought up the subject of immunity for you?

A I don't exactly recall.

Q What did Mr. Gabbert say when Mr. Conn brought up the issue of arresting you in Los Angeles County or Orange County?

A I honestly don't recall. That was stunning to me. From that point, I was a mess. I was shaking and completely scared. I don't remember.

Q What happened next?

A The next thing I can remember - and I don't know if this is in sequence - as we were sitting in Mr. Conn's office. I don't know if that is in sequence or not, as far

* * *

[p. 51] Q Did you overhear Mr. Conn say that, or did somebody tell you that?

A Honestly, I don't remember how that information came to me.

Q How long were you in Mr. Conn's office?

A Gosh. Again, I don't specifically remember. It would be between 10 and 25 minutes.

Q So after you leave Mr. Conn's office, where do you and Mr. Gabbert go?

A Back to the 13th floor. I'm not sure if we waited in the hall or were actually taken into - I guess for our purposes, I will clarify. When I say the waiting room, I mean the place where you wait to go into the grand jury. So it's possible we were brought into the waiting room at that point. But, again, I don't remember specifically.

Q What time is it when you and Mr. Gabbert return to the grand jury room from Mr. Conn's office?

A I really have no idea.

Q Was it before noon?

A I don't know.

Q Was it in the afternoon or morning?

A I would be inclined to say more toward the morning time.

Q So the two of you come back to the grand jury room. Then what happens?

[p. 52] A This is - all of this was so hazy to me that I'm going to apologize ahead of time for not knowing specifics. We were at - at some point I was directed by someone that I was going to have to go and wait for a period of time. And then, for some reason, Mr. Gabbert was taken out of that room to be searched by an older gentleman who I now know as Mr. Oppenheim, and I believe at the time he may have been introduced as that

man. And my recollection is that as I was being taken into the grand jury room Paul was being taken away to be searched.

Q By whom?

A By the older gentleman, Mr. Oppenheim.

Q Who took you into the grand jury room?

A I don't remember specifically at that time. I remember there was an African American woman that was the first face I saw as I went into the room.

Q Prior to going into the grand jury room on March 24, 1994, had you had an opportunity to consult with your attorney, Mr. Gabbert, about your grand jury testimony before you went in to talk to them?

MS. PODBERESKY: I am going to object on Sixth Amendment grounds and attorney-client privilege. Can I have a moment?

(Witness's counsel confers with Plaintiff out of the hearing of the

* * *

[p. 57] A Yes.

Q Who directed that question to you?

A I shouldn't speculate.

Q Give me your best estimate as to who that was.

A I know it was either Najera or Conn. But I was just nervous. I don't remember exactly who it was at this time. One of them.

Q What question did they direct to you?

A Something to the effect, was I acquainted with or did I know Lyle Menendez.

Q Did you answer that question?

A No.

Q Why not?

A I wanted to be clear as to whether or not that was something I could answer. So I asked for a moment to confer with my attorney.

Q Whom did you make that request to?

A I said it into the microphone. But I assume the Jury foreperson is the woman I was technically directing it to.

Q So you made a request to the Jury foreman that you wanted to confer with your attorney, Paul Gabbert; is that correct?

A Yes.

Q Were you allowed then to go confer with your [p. 58] attorney, Paul Gabbert?

A I was allowed to leave the room. When I got out of the room, Paul was not there. I sat for a moment, feeling very agitated, got up, and went out into - there is an area where you first come in some glass, double doors where there is a place for a secretary-type person or a receptionist to sit - and I encountered a heavyset woman and I asked her did she know where Paul was. I don't remember if she actually said she knew where he was,

but she indicated in some manner she would try to assist me in finding him.

Q Was she an attorney?

A I don't know.

Q Did she find Mr. Gabbert?

A She located him. And my recollection is that he was across toward the back of the large room in which the heavyset woman was seated in the front of this room. I saw Mr. Gabbert across the room, and I recall him - he was taking his jacket off is the memory I have fixed in my mind - and somehow, either verbally or using body language, or some way, I got the indication from him that I should go ahead and go back in and assert my Fifth Amendment right.

Q How did you get that indication from Mr. Gabbert?

A At this time I don't remember. I just remembered that that is - somehow that is what was conveyed to me from him.

[p. 59] Q Did the two of you make eye contact?

A I don't recall.

Q Did he say anything to you?

A Again, I don't recall specifically. I just know that's the action I took.

Q You say he had his jacket off; correct?

A Yes.

Q Was anyone with him?

A As far as speculating -

Q Did you see anyone in his presence?

A No, I didn't. Because I was only given partial view, from the vantage point I was standing into the room.

Q Now, this older gentleman that you said - this Special Master that was with Mr. Gabbert, did you see that when you had this picture of Mr. Gabbert with his coat off?

A I don't recall seeing him in the room. I do remember seeing him in the waiting area. I do remember him because he was dressed all in blue.

Q So when you asked the grand jury could you go and confer with your attorney, did you confer with your attorney?

A At that point, no.

(The witness confers with her counsel out of the hearing of the reporter.)

THE WITNESS: No.

[p. 60] BY MR. BRAZILE:

Q You did not; correct?

A That's correct.

Q Even though you made a request to do so; correct?

A Yes.

Q And the reason you did not consult with your is what?

A He was in another room subject to a search.

Q Could you see anyone searching him?

A Not that I recall.

Q Did you ask anyone to convey a message to him?

A Yes. I initially asked the heavysset lady - she was dressed in pink, if you can go that far back - I don't remember who it was - if she could get my attorney, I needed to ask him something regarding whether or not I could answer a question. I wasn't specific with her, but I asked for her assistance.

Q Again, what did she tell you?

A Again, I don't remember. I had the recollection that she was in some way trying to be helpful to see that perhaps she would go to see if she could find him, or she called in that direction or something.

Q Now, this room that you saw Mr. Gabbert in, where were you when you were looking at him in this room?

A Are you familiar with where I am referring to?

[p. 61] Q I believe so, yes.

A Okay. I think there are double glass doors that you walk into, and you go to your right to get into the actual waiting area. There is a front desk reception area, and there's a hallway here (indicating). I was standing far enough back so I could see her typewriter and other

office items back there. I was standing right about here (indicating,) and my recollection is that he was standing in a room somewhere in this neighborhood (indicating).

Q Did you see anyone else in the room that he was in at that time, that being Mr. Gabbert? Was anyone else in the room with him at that time?

A I heard him speaking, but I didn't see anybody in the room with him.

Q What was he saying?

A I don't know.

Q After you see Mr. Gabbert, and you don't communicate with him, what did you do next?

A Somehow communication took place, at least on my end. I felt that I should go back in and assert my Fifth Amendment right, although I can't specifically tell you whether it was through body language or verbal or what. But I went back into the room and asserted my Fifth.

Q Prior to you going back in the room to assert the Fifth Amendment right, did Mr. Gabbert say anything to you?

[p. 62] A Not that I can recall.

Q Did you say anything to him?

A I believe the heavysset woman was the conveyor of information, as far as my end goes.

Q Did you ever see her communicating with Mr. Gabbert or say anything to him?

A I believe she either moved to the room or yelled in his direction, "Your client needs to speak with you," or something of that nature.

Q Did she get his attention?

A Yes.

Q Did he look at you?

A I think that's how I was able to see him. Because the vantage point that I was at, I couldn't see clearly the things in the room. I believe he poked his head out.

Q What did he say when he poked his head out?

A Again, I'm certainly not quoting him, and this is just a general recollection, that, "Tell her that I can't see her now, or I can't help her now, I am being searched," or something like that. That's what I think was the information conveyed.

Q Did he say anything else to you at that point?

A Not that I recall.

Q How far away from Mr. Gabbert were you when he [p. 63] said, "I can't help her right now; I'm being searched"?

A I have no idea, in terms of feet.

Q Give me your best estimate.

A I can use this room to show you.

Q Sure.

A I would probably maybe have been to that corner, farther away than that wall even. Maybe, again, a quarter

of this room more away. So this room, plus a quarter, maybe.

Q 40 to 30 feet away; is that accurate?

A Honestly, I'm really not good - I don't read maps, and I have no concept of space.

Q What if we do it by car lengths? How many car lengths would you say?

A Maybe three to five.

Q Car lengths?

A Yes.

Q So what happens next?

A I go back into the grand jury room. They reask me the question.

Q What question did they ask you?

A To the effect, am I somehow acquainted with, do I know Lyle Menendez.

Q Who asked that question?

A Again, either Miss Najera or Mr. Conn.

[p. 64] Q And what did you say at that point?

A I had a card that I had - because I was nervous - written down, "I respectfully decline due to the fact that it may tend to incriminate me . . ." The Fifth Amendment assertion, whatever that legal item is asserted it.

Q Who gave you that card?

A I had the card myself. Because I tend to be nervous, and I wanted to make sure I was complying with the rules.

Q Prior to going into the grand jury room and testifying, did Mr. Gabbert ever tell you that if you didn't understand a question, just to take the Fifth Amendment?

MS. PODBERESKY: Objection. Calls for attorney-client privileged communication. I instruct her not to answer.

BY MR. BRAZILE:

Q Prior to going into the grand jury room and testifying, did you have any discussion with Mr. Gabbert about taking the Fifth Amendment?

MS. PODBERESKY: I'm going to assert the attorney-client privilege communication and Sixth Amendment and instruct my client not to answer.

MR. BRAZILE: So that the record is clear, and we can have a clear record for the magistrate, the question to your client is: Prior to her going in to testify before the grand [p. 65] jury, did she have any discussions with Mr. Gabbert about taking the Fifth Amendment?

MS. PODBERESKY: And I am posing the objection I just stated on the record and instructing my client not to answer.

MR. BRAZILE: That's fine. That's all I need.

Q So when you go back in and take the Fifth Amendment, what happens?

A They ask me a very similar question, and, again, I asked for a moment with my attorney.

Q So do you go outside the grand jury room at that point?

A Yes.

Q What were your words?

A I said, "May I have a moment with my attorney." Don't quote me on that. That's what I think I said.

Q Who did you state that to?

A Again, into the microphone, probably directed at the jury foreperson.

Q What happened after you made that statement?

A Again, the African-American woman got up and let me out of the room. And I came out and proceeded to wait for what I perceived as a considerable amount of time, although it probably wasn't, in fact. I don't know. I was super, super, super nervous, real upset because I wasn't able to see Paul. I didn't know, in fact, whether I should have asserted [p. 66] the Fifth Amendment on the first question, and I was waiting, again. And I don't know if you've ever had to testify before the grand jury, but making 50 people, or however many people, wait for you, constantly going out of the room made me even more upset. I was real upset waiting, and it seemed like an eternity. I recall the bailiff was there with me. And at that point - at some point, I was directed to go back into the room, that they could not wait any longer, that I had to go back into the room. And I said I needed to talk to my attorney. And I don't know if they said, "Too bad," but

they said, "I'm sorry, ma'am, you have to go in." I don't know who said that to me.

Q So you didn't get a chance to speak to Mr. Gabbert?

A No. The second time I came out.

Q So you go back into the grand jury?

A Yes.

Q Then what happens?

A Because I didn't know what else to do, I, again, asserted the Fifth Amendment, only because the question was very similar to the first.

Q So what happens once you asserted the Fifth Amendment privilege the second time?

A I believe they began to ask me another question which I don't recall the content of the question, and as I [p. 67] was saying the sentence, "May I have a moment with my attorney," Mr. Conn got up and was very upset. I don't know what caused him to be upset, but he started discussing something with the jury foreperson that he was moving to hold this witness in contempt because I didn't produce something.

Q So at is that point, was that the third or fourth time that you had asserted the Fifth Amendment privilege?

A I had only asserted the Fifth Amendment twice. The third occasion that they began to ask me a question, of which I don't remember the exact content, I was about to ask for a moment with my attorney - which would

have been the third time – that I asked for a moment with my attorney, and Mr. Conn got up and was angry about something and said that he was going to hold me in contempt of court which then, of course, added to my already hysterical nature at that time because I was whacked out. So –

Q Then what happened?

A I think I was let out of the room. Well, she admonished me, and I was let out of the room, and I was in the waiting area. By then, I believe Mr. Gabbert was back with me. Someone, I think Mr. Zoeller, delivered – no, I take that back – I'm not clear on this at all. At this time – I don't know if it's correct in time sequence, this is my memory – Mr. Gabbert was searched, his physical stuff, by Mr. Zoeller. And I believe Mr. Conn and Miss Najera were [p. 68] there for a period of time, although it's not my feeling they were there the entire time. They looked through Mr. Gabbert's personal –

Q When you say "they," who are you referring to?

A I will rephrase that. Well, "they" would be Mr. Zoeller, and I think Miss Najera and Mr. Conn were in the room. Mr. Zoeller was physically looking through Mr. Gabbert's briefcase and his man's purse. It's a purse. It wasn't a woman's purse.

Q When you went in to testify before the grand jury on the first occasion, did Mr. Gabbert ever indicate to you where he would be when you were testifying?

A Not that I recall.

Q Did he ever tell you, prior to you going in to testify before the grand jury, that he would go in the grand jury room with you?

MS. PODBERESKY: I am going to object. It calls for attorney-client privileged information, and instruct my client not to answer.

BY MR. BRAZILE:

Q Did you have any understanding whatsoever as to where Mr. Gabbert would be when you were in the grand jury testifying?

A Yes.

Q Where did you believe he would be?

[p. 69] A In the waiting area.

Q Did he tell you he was going to be in the waiting area, or did someone else tell you he would be in the waiting area.

MS. PODBERESKY: I am going to object to the extent it calls for attorney-client privilege and instruct my client not to answer.

BY MR. BRAZILE:

Q Why did you believe that he would be waiting for you in the waiting area while you were testifying before the grand jury?

(The witness confers with her counsel, Plaintiff and Plaintiff's counsel out of the hearing of the Reporter.)

MS. PODBERESKY: Can you repeat the question?

BY MR. BRAZILE:

Q Why did you believe that Mr. Gabbert would be waiting for you in the waiting room when you were testifying before the grand jury?

A Because I knew that he was not allowed to be in there with me. I believed he would be somewhere close by.

Q Let's go back to when you testified before the grand jury on the first occasion.

Did you tell anyone in the grand jury room when you first went in to testify that you were not able to speak

* * *

[p. 73] that effect. I don't know if I used the exact words you are using. Because it was a long time ago, and I was super nervous. Again, I was reading off a card. So I think since my mind wasn't really generating the words is why I don't remember.

BY MR. BRAZILE:

Q Were the words "Based upon the advice of counsel" on the card that you were reading off of?

A Something similar to those words. If not, in fact, those, something very similar, I think.

Q And you had that card with you in the grand jury room?

A Yes.

Q Do you still have that card with you?

A No.

Q Do you know where it is?

A No.

Q So then you go out of the grand jury room, and after you tell them that you will not answer the question, you go back out into the waiting room; correct?

A This is after the first question?

Q After the first question.

A Okay. They asked me if I was acquainted with, can I have a moment with my attorney -

Q Right.

* * *

[p. 76] door.

Q Then what happens?

A They asked me the question. I said, "May I have a moment with my attorney." Mr. Conn got up, and I don't know what he said, but I recall him saying that he was moving to hold me in contempt. At that point, the Jury forewoman said whatever she needed to say, admonished me, and I was taken out into the waiting area again.

Q Then what happened?

A I think this is where Mr. Zoeller was searching Paul's personal items - briefcase and purse. After that, I was ordered down the hallway by the bailiff. Paul was not with me. He was gathering - he was not with me. I don't know what he was doing. The bailiff, court reporter, African-American gentleman, court reporter, some

other folks were coming. We were being taken to another courtroom where a contempt of court hearing was to be taking place.

Q Then what happened?

A We were taken into the courtroom. Paul eventually caught up with us. Mr. Gabbert eventually caught up with us, and he wasn't allowed to go in the courtroom at first. I was sitting there alone with Mr. Conn. We were just waiting around for awhile. Eventually Mr. Gabbert was allowed to come in the room, and I think that's when what's called a hearing or proceeding took place.

* * *

[p. 90] Q At some point the judge took the bench?

A Yes.

Q And did Mr. Gabbert have an opportunity to address the Court on your behalf?

A Yes.

Q And then was the hearing postponed or continued so the judge could do some research? Was that your impression?

A Yes.

Q Did it ever reconvene?

A No.

Q Did you feel disadvantaged in any way by not being able to access Mr. Gabbert on those occasions when you went outside the Jury room and did not have immediate contact with him?

A Yes, I did.

Q How so?

A Well -

(Witness confers with her counsel out of the hearing of the reporter.)

My state of mind when I got there that morning was, "Wow, I'm being investigated" Not investigated, I take that back. "I have to go before the grand jury and answer questions." That scared me. I don't know what that is. It sounds real scary.

[p. 91] Mr. Conn made a statement in my presence, would I submit to arrest in the hallway, or would I have to be arrested in Orange County. From that point on, I was super scared because I really thought I was going to be arrested. Then, we're expecting, I think, to have an immunity thing brought down. Instead, suddenly there's a search warrant. My attorney is taken away from me. And I was shaking, really upset, I don't know what to do. I just know I'm going to go into a room with a bunch of people I don't know that are going to ask me questions, and I don't know what I should say. So I come out looking for the only rock that I have for help, and he wasn't there. So I was stuck with some bailiff guy and nobody sitting there. I'm not saying that to be dramatic. That is exactly how I felt. I was indeed at a disadvantage, in that it was highly stress inducing. The thing that made me most upset was I thought I was going to be arrested. That was really - I was thinking "Who has money who can bail me out," you know. That was all that was going through my head, not "What am I going to say," thinking

about anything, but "Who in the Hell is going to bail me out?" And that's where my state of mind was.

Q Other than the emotional disadvantage which you just described, substantively what disadvantage, if any, was there with regard to how you ultimately performed before the grand jury had Mr. Gabbert been available to you, or in this [p. 92] case he had not? Was your Performance before the grand jury you believe in any way different as a result of your not meeting him outside?

MS. PODBERESKY: Objection. It calls for a legal conclusion. I am going to instruct her not to answer that.

MR. MacLATCHIE: I don't want a legal conclusion. I just want to know how she feels her performance was disadvantaged, that's all. Just something within her own personal knowledge.

MS. PODBERESKY: It calls for speculation. I'm going to instruct her not to answer that question.

MR. MacLATCHIE: Okay. I have nothing else.

MR. BRAZILE: I have a few more.

FURTHER EXAMINATION

BY MR. BRAZILE:

Q You said that when you were there, you were super nervous, right, when you were there before the grand jury?

A Yeah.

Q And were you super nervous because you were there or because you knew something?

MS. PODBERESKY: Objection.

MR. BRAZILE: What's your objection?

MS. PODBERESKY: Vague, ambiguous, argumentative. Assert the Fifth Amendment right and instruct her not to [p. 93] answer the question.

BY MR. BRAZILE:

Q Prior to March 21, 1994, had you ever been acquainted with Lyle Menendez?

MS. PODBERESKY: Objection. We have been through that line of questioning. I am going to instruct her not to answer that question.

BY MR. BRAZILE:

Q On March 21, 1994, did you even know who Lyle Menendez was?

MS. PODBERESKY: Objection. Same objection.
BY MR. BRAZILE:

Q Isn't it true, other than taking the Fifth Amendment before the grand jury, you didn't state anything else before the grand jury?

MS. PODBERESKY: Objection. That misstates the testimony here today. She has indicated that she repeatedly asked to consult with her counsel.

BY MR. BRAZILE:

Q Other than asking to consult with your counsel, isn't the only thing you said before the grand jury was

that you were taking the Fifth Amendment based upon the advice of counsel?

A Other than, also, my name. I gave my name.

MR. BRAZILE: I don't have any further questions.

[p. 94] MR. MacLATCHIE: Just one question.

FURTHER EXAMINATION

BY MR. MacLATCHIE:

Q Why did you feel disadvantaged by not being able to immediately access Mr. Gabbert when you had with you that card that articulated what you responded when you were asked the questions?

(The witness and her counsel confer out of the hearing of the reporter.)

MR. MacLATCHIE: For the record, I would really like to get the witness's answer, and not counsel's.

MS. PODBERESKY: For the record, I would like to consult with my client to determine whether her answer is going to call for any kind of attorney-client privileged information.

(The witness and her counsel confer out of the hearing of the reporter.)

MS. PODBERESKY: Go ahead and answer.

THE WITNESS: Well, I had no prior knowledge of what questions would be asked to me by the grand jury, and even if I - I'm not a lawyer, you know, I'm a waitress. I need somebody to help me along. You just

don't throw me into a [p. 95] room and expect me to know what's happening

BY MR. MacLATCHIE:

Q When you say you had no prior knowledge of the questions being asked, I would assume you had no knowledge of the specific questions they would be asking you, word-for-word; is that correct?

A That, and really not a whole lot of indication of what else either.

Q Did it come as a complete surprise to you, out of the blue, that you were asked about your knowledge of Lyle Menendez?

(Witness confers with her counsel out of the hearing of the reporter.)

MS. PODBERESKY: You can answer the question.

THE WITNESS: No. It was not a complete surprise.

MR. MacLATCHIE: I have nothing further.

MR. BRAZILE: Well, I have nothing further either.

Can we stipulate that the court reporter will be relieved of her duties under the Code; that the original of the deposition transcript will be sent to Miss Baker's attorney; that within 30 days of receipt all counsel are to be notified of any changes to the deposition transcript. If we are not so notified within 30 days of receipt, there are to be no changes to the deposition transcript; that the witness will sign the transcript under penalty of perjury;

* * *

[p. 97] STATE OF CALIFORNIA)
) ss.
 COUNTY OF LOS ANGELES)

I declare under penalty of perjury that I have read the foregoing transcript, I have made any corrections, additions, or deletions that I was desirous of making in order to render the within transcript true and correct, and

IN WITNESS WHEREOF, I have hereunto subscribed my name this 22 day of June 1995.

/s/ _____
 WITNESS

[p. 98] STATE OF CALIFORNIA)
) SS
 COUNTY OF LOS ANGELES)

I, JENNIE A. ARNOLD, CSR No. 4182, a Court Reporter in and for the County of Los Angeles, state of California, do hereby certify:

That prior to being examined, TRACI L. BAKER, the witness named in the foregoing deposition, was by me duly affirmed to tell the truth, the whole truth, and nothing but the truth;

That the said deposition was taken before me pursuant to Notice at the time and place therein set forth and was taken down by me; in shorthand and thereafter transcribed into typewriting under my direction and supervision; that the said deposition is a true and correct record of the testimony given by the witness:

That it was stipulated by counsel that said deposition may be read, corrected and signed by the witness under penalty of perjury.

I FURTHER CERTIFY that I am neither counsel for nor in any way related to any party to said action nor in any way interested in the outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name this 10th day of May 1995.

/s/ Jennie A. Arnold
Jennie A. Arnold